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THE MENA BUSINESS LAW REVIEW

مجلة قانون الأعمال لمنطقة الشرق الأوسط و شمال أفريقيا

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Caroline Presber
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Désormais, la MENA Business Law Review sera disponible gratuitement sous format numérique via lexis.ae et Lexis® Middle East

INTRODUCING THE ALL NEW

Dear Readers, *Chers lecteurs,*

It's been six years since the MENA Business Law Review came out with its first issue. Since then, we have published over 200 articles covering all aspects of business law in the Middle East and North Africa.

To ensure that the review continues to provide the in-depth, practical, insightful, and up-to-date legal content that legal practitioners in the region are after, we have made some changes to kick off the magazine's 7th year of publication.

The review will no longer have a Legal News section, as up-to-day legal news is always available online at Lexis® Middle East (for subscribers) and Lexis.ae.

Replacing the Legal News section are two new sections:

- "Case Comment", which will be an extended commentary on a recent case of legal significance in the MENA region.
- "Legislative Insight", which will be a detailed discussion of a recently adopted piece of legislation in the MENA Region.

There will continue to be a "Spotlight" section providing practical information and guidance on a current business law issue in the region.

The MENA Business Law Review will also continue to bring readers a number of feature articles in every issue, relevant to legal practitioners looking for a comprehensive examination of business law issues and trends in the MENA region.

MENA BUSINESS LAW REVIEW!

Finally and most importantly, this will no longer be a print-only review! From now on, the MENA Business Law Review will be available for free in digital format via lexis.ae and Lexis® Middle East.

We hope you'll appreciate these improvements and the articles in this issue!

Cela fait six ans aujourd'hui que le premier numéro de la MENA Business Law Review est paru. Depuis lors, nous avons publié plus de 200 articles couvrant tous les aspects du droit des affaires au Moyen-Orient et en Afrique du Nord.

Afin d'assurer la continuité de la publication de contenus juridiques approfondis, pratiques, pertinents et à jour tant recherchés par les praticiens du droit de la région, nous avons apporté quelques modifications à la revue, à l'aube du lancement de sa 7e année de parution.

La revue ne comportera plus de section « Legal News », car des actualités juridiques mises à jour sont toujours disponibles en ligne sur Lexis® Middle East (pour les abonnés) et Lexis.ae.

Deux nouvelles sections remplaceront désormais la section « Actualités juridiques » :

- *« Case Comment », qui propose un commentaire détaillé d'une affaire récente, dont l'apport juridique est important dans la région MENA ;*
- *« Legislative Insight », qui consiste en une étude détaillée d'un texte législatif récemment adopté dans la région MENA.*

La section « Spotlight », fournissant des informations pratiques et des conseils sur une question d'actualité en matière de droit des affaires dans la région, sera toujours présente.

La MENA Business Law Review continuera également à offrir aux lecteurs un certain nombre d'articles de fond dans chaque numéro, pertinents pour les praticiens du droit à la recherche d'une analyse approfondie des questions et tendances du droit des affaires dans la région MENA.

Enfin et surtout, ce ne sera plus une revue uniquement imprimée. Désormais, la MENA Business Law Review sera disponible gratuitement sous format numérique via lexis.ae et Lexis® Middle East !

Nous espérons que vous apprécierez ces améliorations et les articles de ce numéro !

Emergency Relief Options in MENA Arbitrations

This article outlines key aspects of emergency arbitration, its availability in the MENA Region, and significant issues which businesspeople and their lawyers should be aware of, including about certain of its processes and procedures, the inability to seek emergency relief without notice to the other party or parties, and enforcement of orders made in emergency arbitration.

Cet article décrit les principaux aspects de l'arbitrage d'urgence, sa disponibilité dans la région MENA et les problèmes importants dont les hommes d'affaires et leurs avocats doivent être conscients, notamment relatifs à certains de ses procédés et procédures, à l'impossibilité de demander une aide d'urgence sans en avertir l'autre partie ou les parties, et à l'exécution des ordonnances rendues dans le cadre d'un arbitrage d'urgence.

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1

More Ways to Seek Emergency Relief

"Emergency arbitration" has emerged as a valuable and convenient process to maintain the status quo, preserve evidence or assets, prevent irreparable loss or harm, or obtain other urgent interim measures even before the formation of an arbitral tribunal.

The parties to arbitral disputes traditionally have had only recourse to national courts for immediate measures before the formation of an arbitral tribunal. It can take months for an arbitral tribunal to be constituted after an arbitration is commenced, whether the tribunal consists of a sole arbitrator or three arbitrators. During that period, the arbitration process had no mechanism to consider requests for urgent relief.

In recent years, numerous arbitral institutions have adopted procedures for "emergency arbitration" to address urgent requests for interim measures.

This article outlines key aspects of emergency arbitration, its availability in the MENA Region, and significant issues which businesspeople and their lawyers should be aware of, including about certain

of its processes and procedures, the inability to seek emergency relief without notice to the other party or parties, and enforcement of orders made in emergency arbitration.

2

Arbitral Institutions Developed Emergency Arbitration to Meet a Business Need

Emergency arbitration was developed by major arbitral institutions to meet a need that they observed existed for businesses to have an expeditious means of seeking urgent relief within the arbitral process at a time before an arbitral tribunal could be constituted.

Emergency arbitration began with, and has been developed by, leading arbitration institutions, in particular the American Arbitration Association / International Centre for Dispute Resolution, the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA).

In the MENA Region, some but not all arbitral institutions' rules offer it. The Bahrain Chamber for Dispute Resolution (BCDR) and the Saudi Chamber for Commercial Arbitration (SCCA) have incorporated emergency arbitration in their rules.

3

Interim Measures Generally

Usually there is concurrent jurisdiction of arbitral tribunals and national courts to grant orders pending the outcome of an arbitration, and to aid the arbitral process and its integrity, which are known in arbitration as "interim measures" or "interim relief". Various interim measures may be sought at different stages of an arbitration, as grounds may appear.

"Interim relief" has been defined as provisional or conservatory relief aimed at protecting one party's rights during arbitration before the pronouncement of the final award.[1]

Recourse to courts for interim relief gives rise to issues such as the loss of confidentiality in many instances, neutrality concerns in some jurisdictions, and delay and cost.

1. David E. Wagoner, "Interim Relief In International Arbitration" (1996) Arbitration: The Intl J. of Arb. Med. & Disp. Mgmt 131.

Recourse to courts for interim relief gives rise to issues such as the loss of confidentiality in many instances, neutrality concerns in some jurisdictions, and delay and cost.

In rare cases, there may be a reluctance of a court to grant interim measures. For instance, in one case, a United States Appellate Court granted an appeal against an order by a District Court for attachment on the premises on the basis that any court action that sought to bypass the agreed-upon method of settling disputes, i.e., arbitration, was prohibited by the Convention on Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention).[2]

Interim relief was at one time only available through national courts, and in some instances, pursuit of such relief before courts led to waiver of the right to arbitration.[3] This position has vastly changed, and the exclusionary approach has been replaced by making available rules for the interim relief before the arbitral tribunal. These developments have been adopted, and leading arbitral institutions have concurrently accepted the right to invoke national courts.[4]

"Interim measures" have been more exhaustively defined by the United Nations Commission on International Trade Law (UNCITRAL) Model Law. Article 17A of the Model Law states that interim measures are temporary orders made by the arbitral tribunal prior to the final pronouncement of the award. At one time, the granting interim measures was rare, primarily due to a lack of clarity on the enforcement of such measures. However, the trend has changed due to the active issuance of such orders by ICC tribunals and tribunals of other leading arbitral institutions.[5]

Interim relief orders may be made to *maintain the status quo, take action to prevent or refrain from taking action prejudicial to the arbitral process, preserve assets for satisfaction of* awards, and *preserve evidence*.[6] The Model Law also lays down the conditions of *"harm not adequately reparable by an award and reasonable possibility of success on merits"* for grant of interim measures.[7]

These conditions in the UNCITRAL Model Law are widely accepted as principles by all leading arbitral institutions. The phrase *"harm not adequately reparable by an award"* means *"a particular type of harm occurring in a situation where it could be shown that the requesting party should be protected against harm that an award of damages could not remedy."*[8] Regarding the principle of a reasonable possibility of success, the emergency arbitrator should consider the merits only enough to be satisfied of minimal reasonability in most circumstances.[9]

The major arbitral institutions in the MENA region provide for interim measures in their rules.

2. *McCreary Tire & Rubber Co v Ceat SpA*, (1974) 501 F 2d 1032 (3rd Cir, US), para 28.
3. Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press 2008), 100.
4. Grant Hanessian and E Alexandra Dosman, "Songs of Innocence and Experience: Ten Years of Emergency Arbitration" 27 American Rev. of Intl. Arb. 215 (2016).
5. Sundra Rajoo *et al.*, *Law, Practice and Procedure of Arbitration* (LexisNexis 2017), 511.
6. United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 (UN 1985).
7. *Ibid.*, art 17A.
8. David D. Caron and Lee M Caplan, *The UNCITRAL arbitration rules: a commentary* (Oxford University Press 2013), 587.
9. Marc J. Goldstein, "A Glance Into History For The Emergency Arbitrator" 40 Fordham Int'l LJ 779, 796 (2016).

The major arbitral institutions in the MENA region provide for interim measures in their rules. However, the applicant's decision to resort to a court or an arbitration tribunal for interim measures depends on the particular circumstances of each case, including enforcement considerations.

4

Emergency Interim Measures

The question of a forum for seeking interim measures becomes critical when the arbitral tribunal has not been constituted yet but emergency relief is required to maintain the status quo, preserve evidence or assets, prevent irreparable loss or harm or otherwise aim to ensure the integrity of the arbitration. In the absence of an emergency arbitration, recourse to courts would be the only option.

The issues with court applications discussed above, when court applications were the only possible route for seeking urgent interim measures, led to the development and adoption of emergency arbitration rules by arbitral institutions.

5

Emergency Arbitration in the MENA Region

In the MENA region, emergency arbitration has been implemented by the BCDR and the SCCA, as well as the DIFC-LCIA (which has been merged into the DIAC). Other institutions in the MENA region do not offer emergency arbitration (as noted on the chart at the end of the article).

The emergency arbitration rules as implemented by the BCDR and SCCA have common characteristics. Their features follow international best practices for emergency arbitration.

A. ACCESS TO COURTS

Most arbitration institutions, in their arbitration rules, allow or do not preclude applications to courts for interim relief, including emergency measures.[10] [11] Notably, the ICC and LCIA rules do not prohibit a party from approaching a national court for interim relief despite the availability under their rules of emergency relief applications.[12] [13]

Emergency arbitration procedures do not provide for any interim measure orders in the absence of the other party or parties to the arbitration. Any orders of interim relief by emergency arbitrators can only be issued on notice to all parties.

However, emergency arbitration procedures do not provide for any interim measure orders in the absence of the other party or parties to the arbitration. Any orders of interim relief by emergency arbitrators can only be issued on notice to all parties.

The ICC and LCIA rules contain provisions for the parties to an arbitration agreement under those rules to opt out of the availability of emergency arbitration. The procedure applies automatically in respect of arbitration agreements concluded after 1 January 2012 unless the parties expressly opt out. The SCCA rules, while defining the scope of applicability of the rules, provide an option for the parties to modify the rules, including the emergency arbitration rules. However, the BCDR rules contains no express provisions for the parties to modify its rules.

The inability to seek emergency relief without notice to the other party or parties, and the difficulties enforcing arbitral tribunal ordered interim measures, may leave recourse to national courts for interim relief as the only practical route for seeking urgent relief. This approach for interim measures might be ideal in some instances.[14]

Parties arbitrating at the Qatar International Centre for Conciliation and Arbitration (QICCA), Cairo Regional Centre for International Commercial Arbitration (CRCICA), Casablanca International Mediation and Arbitration Centre (CIMAC), or Lebanese and International Arbitration Centre (LIAC) as their arbitration centres also may resort to national courts for interim emergency relief but these institutions' rules do not offer emergency arbitration (as shown on the chart at the end of this article).

B. ROLE OF ARBITRAL INSTITUTIONS

Institutions function as "gatekeepers" to determine whether the emergency arbitration provisions are applicable in a particular situation.

Arbitration institutions generally have a significant role in relation to emergency arbitration. Institutions function as "gatekeepers" to determine whether the emergency arbitration provisions are applicable in a particular situation. If the insitution decides that they are not, an emergency arbitrator will not be appointed.

SCCA emergency arbitrator appointment requests are made to the Administrator of SCCA and in the case of BCDR, applications for

10. Bahrain Chamber for Dispute Resolution, Rules of Arbitration, 2017, art. 14.12.
11. Saudi Centre for Commercial Arbitration, Arbitration Rules, 2018, art. 6 (8).
12. London Court of International Arbitration, LCIA Arbitration Rules, *2020*, art. 9.13.
13. International Commercial Court, 2021 Arbitration Rules, art. 29.
14. Rania Alnaber, "Emergency Arbitration: Mere Innovation or Vast Improvement" 35 Arbitration International 441 (2019).

emergency arbitration is made before the Centre by any party.[15] SCCA determines the applicability of the emergency arbitration provisions.[16] In the case of BCDR, the emergency arbitrator, once appointed, has the authority to rule on its jurisdiction, which is a similar position with the other institutuion rules.[17]

In the case of DIAC, after the promulgation of Dubai Decree No. 34/2021 (effective 20 September 2021), the Arbitration Court has been constituted and vested with powers to supervise emergency arbitration under the prescribed arbitration rules or DIAC By-Laws.[18] The DIAC Arbitration Rules 2007 do not provide for emergency arbitration.

The DIFC-LCIA Rules, subject to agreement between the parties, provide for a request for emergency arbitration to be made to the LCIA Court. However, after the promulgation of Dubai Decree No. 34/2021, the situation has become ambiguous for agreements providing for the DIFC-LCIA as the arbitration institution.

One commentator, remarking on the ambiguity, states that:

> *"all new cases that are referred to the DIFC-LCIA after the Decree will not be determined under the DIFC-LCIA Rules but will rather be resolved by the DIAC Rules under the administration of DIAC, unless the parties agree otherwise."*[19]

The Federal Law on Arbitration states that the Chief Justice of the Competent Court may grant interim measures at any stage before or during arbitration proceedings.

Until the DIAC Rules are updated to include emergency arbitration, the parties only have recourse to the national courts for emergency relief. The Federal Law on Arbitration states that the Chief Justice of the Competent Court may grant interim measures at any stage before or during arbitration proceedings.[20]

The role of SCCA institution is decisive in that they determine if an emergency arbitrator will be appointed. SCCA can refuse to appoint an emergency arbitrator if the emergency arbitration rules are not applicable.

Thus arbitral intitution in the MENA region that provide for emergency arbitration, like the ICC and LCIA, have the authority to screen emergency arbitration applications and to appoint emergency arbitrators.[21] [22]

15. Bahrain Chamber for Dispute Resolution, Rules of Arbitration, 2017, art 14.2.
16. Saudi Centre for Commercial Arbitration, Arbitration Rules, 2018, app III, art 1(6).
17. Bahrain Chamber for Dispute Resolution, Rules of Arbitration, 2017, art 14.6.
18. Dubai Decree No. 34/2021 Concerning the Dubai International Arbitration Centre, art. 11(9).
19. A. Wagg & M. Page, "New light shed on future of Dubai Arbitration – clarifying Dubai Decree No. 34/2021 concerning Dubai International Arbitration Centre", Hadef & Partners, 2021, https://www.hadefpartners.com/News/535/New-light-shed-on-future-of-Dubai-arbitration-%E2%80%93-clarifying-Decree-No.-34-of-2021-concerning-Dubai-International-Arbitration-Centre> accessed 01-Feb-2022 (accessed 1 March 2022).
20. UAE Federal Law No. 6/2018 on Arbitration , art. 18(2).
21. International Commercial Court, 2021 Arbitration Rules, App. V, art 2.
22. London Court of International Arbitration, LCIA Arbitration Rules, 2020, art 9.6.

C. PROCEDURES FOR EMERGENCY ARBITRATION

The emergency arbitration procedures of SCCA and BCDR are similar to each other, and similar to those of the ICC and LCIA. The procedural details for emergency arbitrations are as follows:

(i) The procedure for seeking emergency arbitration may be invoked after or concurrent with submission of a request for arbitration or notice of arbitration. SCCA and BCDR require that emergency arbitration be invoked through an application in writing setting out the nature, reasons and legal basis of the emergency measures sought by the requesting party. The rules also require that all parties to the arbitration be notified and supplied with the application for emergency measures.[23] [24]

(ii) SCCA stipulates that emergency arbitrators must be appointed within one business day of SCCA receiving the request for emergency arbitration,[25] while BCDR prescribes the sole emergency arbitrator must be appointed within two business days or as soon as practicable after receiving the notice application for emergency relief.[26]

(iii) SCCA transmits the file to the emergency arbitrator and notify the parties, and it determines the place of emergency arbitration meetings. The emergency arbitrator is required to establish a procedural timetable within two days of appointment, considering the urgency inherent in the emergency arbitration. BCDR lays down a similar timeline for issuing the timetable for the emergency arbitration. SCCA prescribes that the order or award must be made no later than 14 days from the transmission of the emergency request file. BCDR sets out the deadline to issue the award as 15 days from filing the emergency arbitration request.

(iv) Standards for granting emergency relief:

The institutional arbitral rules vest broad powers in emergency arbitrators. These powers are in line with powers to grant interim measures enjoyed by a regular arbitral tribunal. Similar standards and principles are applied for emergency relief.

SCCA's emergency provisions follow the Model Law, as outlined above, with the conditions for granting relief enshrined in the provisions. However, the principles developed by international arbitration practices have credence in their application in emergency arbitration before SCCA. Likewise, BCDR confers powers on an emergency arbitrator to award any interim or conservatory measure deemed necessary.

6

Post-Award Complications

Institutional arbitration rules categorise the emergency orders as interim awards. Despite this categorisation, these interim awards may face enforcement issues. One reason for this is "*the scarcity of authoritative guidance*".[27]

23. Saudi Centre for Commercial Arbitration, Arbitration Rules, 2018, Appendix, art. 1.
24. Bahrain Chamber for Dispute Resolution, Rules of Arbitration, 2017, art. 14.1.
25. Saudi Centre for Commercial Arbitration, Arbitration Rules, 2018, Appendix III, art. 2.
26. Bahrain Chamber for Dispute Resolution, Rules of Arbitration, 2017, art. 14.3.
27. Rania Alnaber, "Emergency Arbitration: Mere Innovation or Vast Improvement" 35 Arbitration International 441 (2019).

Whether interim relief granted by an emergency arbitrator is enforceable in the same fashion as interim relief ordered by the substantive tribunal also remains a live issue.

Whether interim relief granted by an emergency arbitrator is enforceable in the same fashion as interim relief ordered by the substantive tribunal also remains a live issue. The United States had led the enforcement movement. For example, in *CE International Resources Holdings Limited v. SA Minerals Ltd et al. (2012)*, the US Federal Court held that an interim relief award was capable of immediate recognition and enforcement.[28]

There are encouraging signs that other jurisdictions are following suit and taking a pro-enforcement approach to interim arbitrator relief. For example, the courts of Ukraine enforced a decision of an emergency arbitrator appointed under the Stockholm Chamber of Commerce (SCC) rules in the context of an investor-State dispute under the Energy Charter Treaty.[29] However, not all jurisdictions are heading in this direction. The Swiss Federal Tribunal, for example, has characterised it as "dangerous" to treat interim measures as an award.[30]

28. John William Rowley, Emmanuel Gaillard and Gordon E Kaiser, *The Guide to Challenging and Enforcing Arbitration Awards* (Law Business Research Limited, 2019), 121.
29. *JKX Oil & Gas plc, Poltava Gas B.V. and Poltava Petroleum Company JV v. Ukraine.*
30. *X v. Y Judgment of 13 April 2010,* DFT 136 III 200 (Swiss Federal Tribunal).

7 Conclusion

Only two leading MENA region arbitral institutions, SCCA and BCDR, have adopted emergency arbitration, while the situation of emergency arbitration as provided by the DIFC-LCIA Rules remains ambiguous after the issuance of Federal Law No. 6/2021. Likely the forthcoming new DIAC Rules will provide for emergency arbitration.

In arbitrations under the rules of other MENA arbitral institutions, at least for now, national courts remain the forum in which to seek interim measures before the constitution of an arbitral tribunal.

In arbitrations under the rules of other MENA arbitral institutions, at least for now, national courts remain the forum in which to seek interim measures before the constitution of an arbitral tribunal.

The emergency arbitration framework available in SCCA and BCDR arbitrations provides an efficient and efficacious procedure to seek emergency interim relief before an arbitral tribunal has been constituted. However, data relating to its utilisation is scarce.

Globally, court enforcement of interim measures issued by emergency arbitrators remains uncertain and uneven. Until more proceedings to enforce emergency arbitrator decisions come before courts, or until legislative solutions are implemented, questions over the enforceability of emergency arbitrator relief will remain.

It is essential for a party to consider the uncertainties associated with enforcement when deciding whether, before the arbitral tribunal has been constituted, to seek urgent interim relief from an emergency arbitrator or a court. It is critical that, prior to deciding, the party obtain local law advice from the jurisdiction(s) where it is expected that enforcement will be sought.

Appendix: Comparison of Emergency Arbitration & Interim Relief Provisions in the MENA Region

The table below compares provisions relating to interim relief and emergency arbitration in the MENA region.[31]

Institution	Emergency Arbitration	Opt Out	Appointment Speed	Time to Render Award	Access to Courts
BCDR	Yes	No express provisions	Two business days	15	Yes
SCCA	Yes	Yes	One business day	14	Yes
QICCA	No	N/A	N/A	N/A	N/A
CRCICA	No	N/A	N/A	N/A	N/A
CIMAC	No	N/A	N/A	N/A	N/A
LIAC	No	N/A	N/A	N/A	N/A

31. Raja Bose & Ian Meredith, "Emergency Arbitration Procedures: A Comparative Analysis" 5 Intl Arb. L. Rev. (2012) has inspired the table; however, the rules of arbitral institutions in the first column have been consulted to prepare an updated comparison.

توضح هذه المقالة الجوانب الرئيسية للتحكيم في حالات الطوارئ وتوافره في منطقة الشرق الأوسط وشمال إفريقيا والمسائل المهمة التي يجب على رجال الأعمال ومحاميهم أن يكونوا على دراية بها، بما في ذلك العمليات والإجراءات الخاصة بها وكذلك عدم إمكانية طلب الإغاثة الطارئة دون إبلاغ الطرف أو الأطراف الأخرى وتنفيذ الأوامر التي تصدر في حالات التحكيم الطارئ.

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Cross-Border Insolvencies Within One Nation: The UAE Experience

In one of the first expositions by the DIFC Court of the effect of Schedule 4 of the DIFC Insolvency Law—which is an enactment of the UNCITRAL Model Law on Cross-Border Insolvency and its interaction with the UAE's Bankruptcy Law—the DIFC Court confirmed that the UNCITRAL Model Law applies in the DIFC only in relation to corporate insolvency. The authors appeared as counsel in the case.

The Court held that it will carefully consider its jurisdiction to offer recognition and assistance to non-DIFC proceedings (including those of sister Courts in the UAE). The mere fact that a foreign proceeding relates in a general sense to insolvency does not make recognition automatic. The Court emphasised that where issues of discretion arise, the Court is likely to look carefully at the conduct of the parties, and the practical benefit (or otherwise) to the parties in

Dans l'un des premiers exposés, par le tribunal du DIFC, de l'effet de l'annexe 4 de la loi sur l'insolvabilité du DIFC, qui est une application de la loi type de la CNUDCI sur l'insolvabilité transfrontalière, et de son interaction avec la loi sur la faillite des Émirats arabes unis, le tribunal du DIFC a confirmé que la loi type de la CNUDCI ne s'applique au DIFC qu'en ce qui concerne l'insolvabilité des entreprises. Les auteurs ont comparu en tant qu'avocats dans l'affaire.

Le tribunal a déclaré qu'il examinerait attentivement sa compétence pour offrir la reconnaissance et l'assistance aux procédures non DIFC (y compris celles des juridictions sœurs des Émirats arabes unis). Le simple fait qu'une procédure étrangère se rapporte de manière générale à l'insolvabilité ne rend pas la reconnaissance automatique. Le tribunal a souligné que lorsque des questions de pouvoir

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exercising its discretion as to whether or not a stay of DIFC proceedings should be granted or continued.

discrétionnaire se posent, il est susceptible d'examiner attentivement la conduite des parties et l'avantage pratique (ou autre) pour les parties d'exercer son pouvoir discrétionnaire quant à savoir si une suspension des procédures DIFC doit être accordée ou maintenue.

1

Background

A. UAE INSOLVENCY REGIMES

As readers of this journal will be aware, the legal system of the United Arab Emirates is based on its federal system and the presence of two common law jurisdictions (the Dubai International Financial Centre –(**DIFC**)) and the Abu Dhabi Global Market (**ADGM**)) within the seven civil law emirates making up the federation.

Within the civil law jurisdictions, insolvency is dealt with under two laws: the Federal Bankruptcy Law[1] (which applies to companies and individuals classified as traders in relation to their commercial activities) and the Federal Insolvency Law[2] (which applies to individuals).

Being civil or commercial laws, the Federal Bankruptcy Law and the Federal Insolvency Law do not apply in the financial free zones comprising the DIFC and the ADGM. Each has its own law which applies to corporate insolvency only.

Being civil or commercial laws, the Federal Bankruptcy Law and the Federal Insolvency Law do not apply in the financial free zones comprising the DIFC and the ADGM. Each has its own law which applies to corporate insolvency only—in the DIFC, the DIFC Insolvency Law[3] and in the ADGM, the Insolvency Regulations.[4] Each of these prescribes the assistance which their Courts can give to foreign insolvency proceedings (including insolvency proceedings under the Federal Bankruptcy Law) by reference to its locally applicable version of the UNCITRAL Model Law on Cross-Border Insolvency (the "**Model Law**").[5] Neither the Federal Bankruptcy Law nor the Federal Insolvency Law contains corresponding provisions,[6] and the UAE has not otherwise enacted a local version of the Model Law on cross-border insolvency.

Given the significance of the financial free zones within the overall UAE economy[7] and the jurisdiction of the two common law courts, insolvencies of companies and individuals operating within the UAE will frequently create legal issues of some complexity within both the common law and civil law jurisdictions, including conflict of laws issues relating to recognition of foreign insolvency proceedings. In a recent[8] judgment,[9] Justice Sir Jeremy Cooke dealt with some of the issues which can arise in such cases.

Justice Sir Jeremy Cooke's judgment has an immediate impact on five significant cases which are proceeding in the DIFC Court, the total value of the Claims being in excess of USD 725 million.

The application was based on the proposition that the DIFC Court was bound to "recognise" or give effect to the Abu Dhabi bankruptcy proceedings and to stay or pause the DIFC proceedings until the Abu Dhabi bankruptcy procedures were concluded.

The case concerned an application made by persons appointed by the Abu Dhabi Court under Chapter 4 of the Federal Bankruptcy Law as the "*amin*" or "trusted person ("the Trustee", without the legal connotations attaching to that expression in English or DIFC law). The

1. Federal Decree-Law No. 9/2016 on Bankruptcy (hereinafter the "**Federal Bankruptcy Law**").
2. Federal Decree-Law No. 19/2019 on Insolvency (hereinafter the "**Federal Insolvency Law**").
3. DIFC Law No. 1/2019 on the Insolvency Law (hereinafter the "**DIFC Insolvency Law**").
4. The Abu Dhabi Global Market Insolvency Regulations 2015.
5. DIFC Insolvency Law Schedule 4, ADGM Insolvency Regulations Schedule 10.
6. The Federal Bankruptcy Law, by virtue of Article 2, applies only to UAE companies outside the financial free zones and traders.
7. *See*, e.g., DIFC 2021 Annual Report media release. Available at https://www.difc.ae/newsroom/news/difc-records-best-performance-17-year-history-driving-dubais-next-phase-growth/.
8. 4 March 2022.
9. *In the matter of an Application by Salem Mohamed Ballama Altamimi and Others*, CFI-085-2021, 4 March 2022 (DIFC Court of First Instance).

purpose of the application was to bring about a stay—or automatic suspension—of all claims in the DIFC Court involving all parties said to be involved in the Abu Dhabi bankruptcy proceedings. The application was based on the proposition that the DIFC Court was bound to "recognise" or give effect to the Abu Dhabi bankruptcy proceedings and to stay or pause the DIFC proceedings until the Abu Dhabi bankruptcy procedures were concluded. The legal basis of the application was the DIFC Insolvency Law (including the Model Law) as well as what were said to be principles of comity between courts.

Although a decision of the DIFC Courts, identical issues would have arisen had the DIFC proceedings taken place in the ADGM, with, it is suggested, a similar result.

B. DIFC PROCEEDINGS

The proceedings in the DIFC Court involved largely, but not solely, claims by a number of banking syndicates for repayment of loans. The claims were based on the underlying loan agreements and a number of personal and corporate guarantees. The application by the Trustees to stay these proceedings was the latest in a line of attempts on their part, and on the part of the Defendants in the DIFC proceedings, to have the DIFC proceedings stayed.

In each of the Banks' claims, there was a principal claim against a corporate borrower for repayment of loans, together with additional claims against a number of corporate Defendants as guarantors of those loans. The corporate Defendants are part of a larger company group ("**the KBBO Group**") which has been in extreme financial difficulty since, at the latest, mid-2020. The Banks's claims also included claims against two individual Defendants ("**HEAQ**" and "**Mr KBBO**"), who were the owners of the KBBO Group. The claims against HEAQ and Mr KBBO were made pursuant to personal guarantees of the underlying loans.

The individual Defendants challenged the jurisdiction of the DIFC Courts on the basis of allegations of forgery of signatures on the loan agreements and guarantees (which allegedly also invalidated the choice of jurisdiction in favour of the DIFC Courts). The individual Defendants further referred the issue of forgery to the Dubai Courts for adjudication, causing the DIFC proceedings to be stayed pending references to the Joint Judicial Committee, creating a jurisdictional conflict, and a significant delay of the DIFC proceedings.[10]

Two of the DIFC Courts proceedings had proceeded to the point of immediate judgment against many of the Defendants (with the jurisdictional challenge by the two individual Defendants having been dismissed). In those cases, the only outstanding issue was that of the validity of the signatures of one or both of the individual Defendants.

C. ABU BANKRUPTCY PROCEEDINGS

Since November 2020, several applications and letters had been sent to the DIFC Court requesting a stay of the various proceedings on the basis, *inter alia*, that the KBBO group had entered into a restructuring process under Chapter 2 of the Federal Bankruptcy Law. None of these attempts had been accepted by the DIFC Court.

On 27 July 2021 pursuant to an application made by Mr KBBO, the First Claimant in the instant litigation was appointed by the Abu Dhabi Court to carry out the functions prescribed in an order of that date (the "**Commencement Order**") under Chapter 4 of the Federal Bankruptcy Law. Prior to the application, Mr KBBO and HEAQ had concluded a written agreement in which they agreed that they would make an application to the Abu Dhabi Court on behalf of themselves and companies in which they each had an interest. The application was made by Mr KBBO as the "Debtor", with HEAQ and 28 corporate bodies in which they were interested named as "Joined Litigants". In it, Mr KBBO stated that the application was for "restructuring" on the ground of his insolvency. The basis of the application was that the initial financial statements filed with the Court showed that his assets were insufficient, if liquidated and sold, to pay the full value of his debts whether constituted by loans or by guarantees. It was said that extensive efforts had been made to reach agreement with creditors under the supervision and control of the Financial Reorganisation Committee under Chapter 2 of the Federal Bankruptcy Law but that these had failed. In consequence, a request was made to the Abu Dhabi Court to commence with the restructuring of his business and obligations under Chapter 4 of the Federal Bankruptcy Law by appointing the First Claimant to prepare a restructuring plan for approval by the creditors and the Court. An order was also requested for the suspension of all judicial procedures and judicial enforcement against him and his companies pending the approval of the restructuring plan. The final request was for approval by the Court of such a restructuring plan when it was forthcoming or, if it was not possible to reach an agreement with the necessary majority of creditors, for a declaration of bankruptcy and liquidation of his businesses.

In the accounts furnished to the Abu Dhabi Court, upon which Mr KBBO relied in his petition, reference was made to the debts owed by his companies to various banks and his guarantees loans to the corporate debtors

The Court observed that:

> *"any subsequent suggestion that Mr KBBO's signature of such guarantees was forged might thereafter be thought to ring hollow in the face of his reliance upon such guarantees in his petition to the Abu Dhabi Court, but that has not stopped him from saying so in witness statements filed in (one of the Bank's proceedings)."*

The Commencement Order issued by the Abu Dhabi Court on 27 July 2021 referred to 9 joinder applications made in the application to the Court for restructuring by Mr KBBO as the Debtor. This brought the 29 Joined Litigants into the proceedings. Reliance was placed on Article 80(2) of the Federal Bankruptcy Law. It provides that the Court may join any other person in the bankruptcy:

> *"if the assets of such person overlap with the debtor's assets in a way that is hard to disaggregate or in case the Court considers that it shall not be practical or feasible in terms of the cost, to open separate procedures concerning such persons."*

The Abu Dhabi Court found that:

> *"the commencement procedures in one application provides adequate and sufficient protection for the creditors. Accordingly, their inclusion in the proceedings shall be acceptable pursuant to Article 80(1) of the Federal Bankruptcy Law."*

The Court stated that it was acceptable to commence the restructuring immediately and to start preparing a restructuring plan and ruled that a trustee should be appointed to carry out the functions set out in the Federal Bankruptcy Law, which included making an inventory of the assets, and reporting back to the Court, advertising for creditors, preparing a list of creditors, preparing and developing a restructuring plan and advising the Court at least every 21 working days on progress made. It also ordered a stay of judicial proceedings against the Debtor and the Joined Litigants and a stay of execution proceedings against their assets.

The latter order was unnecessary as under the terms of Article 162(1) of the Federal Bankruptcy Law, the commencement of such procedures would automatically result in the stay of actions against the

10. In three of the claims the stay of proceedings has been lifted following the decision of the DIFC Court of Appeal in *Lakhan v. Lamia*. [2021] DIFC CA 001. The Dubai Courts themselves had rejected jurisdiction over the Defendants' claims in at least one of the disputes, but the Defendants were pursuing appeals against this decision in the Dubai Courts.

Debtor and stay of execution on his assets and for such stay to continue until approval of a restructuring plan or the expiry of a ten-month period, subject to any further extension by the Court. The Federal Bankruptcy Law provides for the ability of a creditor with security to request the Court to be excluded from the stay of execution, but such a request has to be notified within one working day of the commencement of the proceedings which rendered the making of such a request by the Banks in the present case impossible.

After appointment of the First Claimant, two further individuals were appointed as "Trustees" at the request of the creditors.

There had been a dispute in various of the Banks' DIFC Court proceedings as to whether the First Claimant alone had standing to act as a foreign representative within the meaning of the Model Law or more generally. This dispute was resolved when the Second and Third Trustees were joined as Claimants.

The past behaviour of the Defendants in those actions and the First Claimant had already been the subject of judicial comment in some of the DIFC Court proceedings. In the context of the instant application, complaint was made in respect of all three Trustees for their conduct since the panel of three was in place. As the Court noted, while such matters might be relevant to the exercise of any discretion by this Court, the foundational questions which the Court had to determine related to the jurisdiction and powers of the DIFC Court as set out in the DIFC Insolvency Law.

2

The Decision on Recognition

A. ISSUE 1: "FOREIGN PROCEEDINGS" AND "FOREIGN REPRESENTATIVE"

Under the Model Law, the terms "*Foreign Representative*" and "*Foreign Proceeding*" each have a defined meaning. Article 2 of the Model Law provides, inter alia:

> *"(a) 'Foreign Proceeding' means a collective judicial or administrative proceeding in a foreign State including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation;*
>
> ...
>
> *(d) 'Foreign Representative' means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding;*
>
> *(e) 'Foreign court' means a judicial or other authority competent to control or supervisory foreign proceeding; and*
>
> *(f) 'Establishment' means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services."*

Article 15 of the Model Law provides that:

> *"a foreign representative may apply to the Court for recognition of the foreign proceeding in which the foreign representative has been appointed."*

The question accordingly arose whether the Abu Dhabi proceedings were a Foreign Proceeding and the Claimants were Foreign Representatives within the meaning of the definitions set out above.

The question accordingly arose whether the Abu Dhabi proceedings were a Foreign Proceeding and the Claimants were Foreign Representatives within the meaning of the definitions set out above.

The Banks disputed that the assets of the Debtor or the Joined Litigants had vested in the Trustees or that they had control of such assets. Under Article 157 of the Federal Bankruptcy Law, the debtor, with effect from the date of the Commencement Order, could not manage his assets or pay any claims arising before the issuance of the decision (with limited exceptions) or dispose of his assets except in accordance with the Federal Bankruptcy Law. Under Article 160, the court may decide to suspend any of the debtor's business based on the urgent request of the trustee. That had not been done. Under Article 161, the trustee may, during his management of the procedures, request the debtor to carry out all that is necessary to preserve the interests of his business and may request the debtor to meet the valid contracts to which he is a party. In practice, it was common ground that following the Commencement Order, Mr KBBO continued to run his businesses with the permission of the Trustee or Trustees, while they sought to put together a plan for restructuring the affairs of the Debtor and the Joined Litigants to be proposed to the creditors for approval.

Under Article 68 of the Federal Bankruptcy Law, an application to open bankruptcy procedures can be made by the debtor where he ceases to pay his debts as they fall due for a period exceeding 30 consecutive working days in consequence of financial difficulties or insolvency. Other provisions permit creditors and the Public Prosecutor to request the court to open bankruptcy procedures where the debtor is insolvent and the public interest requires it. Where the application is made by the debtor, he is required to specify whether it is for the purpose of restructuring or adjudication of bankruptcy and liquidation and he must, in accordance with Article 73, explain the reasons for the application with supporting financial documents.

It followed, the Court found, that the Federal Bankruptcy Law is framed by reference to a "debtor", in this case Mr KBBO, whilst Article 80(2) provides for the joinder of persons whose assets overlap with the debtor's assets in a way that is hard to disaggregate. Such persons are not characterised as "debtors" and the effect of Article 2 of that Law, including Articles 157-162 is to create potential or actual restrictions on the use by the debtor of his assets and not those of the Joined Litigants. A clear distinction is drawn between the "Debtor" on the one hand and the "Joined Litigants" on the other. The Commencement Order did not refer to multiple debtors. Those Joined Litigants might become party to a restructuring or perhaps be put into liquidation in due course, but they were not "debtors" at the current stage of proceedings in Abu Dhabi.

The Court held that the definition of a "foreign proceeding" was apt to include an interim judicial or administrative proceeding, pursuant to a law relating to insolvency in which the assets and affairs of the debtor are subject to supervision by a foreign court for the purpose of reorganisation. Regardless of any question of vesting of assets or the actual management and control of the business affairs of Mr KBBO and his companies, which appear to lie with them, the assets

and affairs of the Debtor and the Joined Litigants were subject to the supervision of the Abu Dhabi Court in an interim proceeding pursuant to a law relating to insolvency for the purpose of reorganisation.

In the circumstances, the Court held that the Trustees did not qualify as the Foreign Representative authorised in a Foreign Proceeding to administer the reorganisation of the Debtor's assets and affairs.

However, the definition of a "foreign representative" requires such a person, whether appointed on an interim basis or otherwise, to be

> *"authorised in a foreign proceeding to administer the reorganisation... of the debtor's assets or affairs or to act as a representative of the foreign proceeding."*

The Court accordingly held that although the order made was described as a Commencement Order, no order had been made for any reorganisation or liquidation by the Abu Dhabi Court, and the functions of the Trustees were only to put forward proposals for restructuring for the approval of the creditors and the Abu Dhabi Court on the basis of information gathered by them in relation to the assets and liabilities of the debtor, with a list of creditors where liability is accepted or disputed. In the circumstances, the Court held that the Trustees did not qualify as the Foreign Representative authorised in a Foreign Proceeding to administer the reorganisation of the Debtor's assets and affairs.

It followed that the application failed on the basis of the absence of standing on the part of the applicants in question to make it, as had occurred in the previous Banks' proceedings.

The Court went on to hold that there were other barriers which stood in the way of a successful application.

B. ISSUE 2: THE DIFC INSOLVENCY LAW AND RECOGNITION

As the Court noted, there is nowhere in the DIFC Insolvency Law any provision relating to the bankruptcy of an individual in the DIFC, as opposed to a corporate entity or those involved in a limited liability partnership. Provisions for Company Voluntary Arrangements, Rehabilitation, Administration, Receivership and Winding Up all apply only to corporate bodies. Under Article 88(2), when a winding up order has been made by the Court, no action or proceeding shall be commenced or continued against the Company or its property, except by leave of the Court and subject to such terms as the Court may impose.

Against that background, the Court held it was unsurprising that Part 7 of the DIFC Insolvency Law only applies to Recognised and Foreign Companies and that Article 117 related to Proceedings in respect of Foreign Companies. Article 117 provides, insofar as material, as follows:

> *"(1) Where a Foreign Company is the subject of insolvency proceedings in its jurisdiction of incorporation, the Court shall upon request from the court of that jurisdiction, assist that court in the gathering and remitting of assets maintained within the DIFC.*
>
> *(2) .....*
>
> *(3) The UNCITRAL Model Law (with certain modifications for application in the DIFC) as set out in Schedule 4 of this Law has force in the DIFC in respect of Foreign Companies. This law applies with such modification as the context requires for the purpose of giving effect to this Article 117(3)."*

The Court held that Articles 117(1) and 117(3) gave the DIFC Court separate jurisdiction and powers.

The Court held that Articles 117(1) and 117(3) gave the DIFC Court separate jurisdiction and powers, with questions of assistance falling outside Article 117(1) falling to be decided in the light of the overall scheme of the DIFC Insolvency Law and the Model Law.

It further held that Article 117(3) provided for the Model Law as set out in Schedule 4 to have force in the DIFC but only in respect of Foreign Companies. The first sentence of that subparagraph made it plain that the Model Law was modified for application in the DIFC and the second sentence made it plain that the DIFC Insolvency Law, which includes Schedule 4, applied with whatever modifications are necessary in order to give effect to Article 117(3). The effect of this was that the operation of the Model Law in the DIFC is restricted to Foreign Companies.

The consequence of this is that the provisions of Schedule 4, whether relating to recognition under Chapter III or to cooperation or assistance under Chapter IV of the Schedule, did not apply to individuals such as Mr KBBO or HEAQ. It was not open to them to seek recognition or a stay of proceedings under any provision of the Model Law or the DIFC Insolvency Law. Any application for a stay by either of those individuals would have to be based on other grounds, whether under some other statutory provision or case management powers. The application for a stay of DIFC proceedings against them on the basis that the Abu Dhabi proceedings should be recognised therefore could not succeed.

Article 17(2) of the Model Law provides:

> *"The foreign proceeding shall be recognised:*
>
> *(a) as a foreign main proceeding if it is taking place in the State where the debtor as the centre of its main interests; or*
>
> *(b) as a foreign non-main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State."*

Each of the provisions refers to the "debtor", with a need in the former case to show that the insolvency proceedings are taking place in the location of its centre of main interests, and in the latter case to show that it has an establishment in that location. As there was only one "Debtor" referred to in the Commencement Order and the Abu Dhabi proceedings, that being Mr KBBO, to whom the provisions of the Model Law did not apply, the Court held there was no relevant debtor for the purposes of recognition in the DIFC.

If the Joined Litigants were not classified as Debtors in the Abu Dhabi proceedings, they could not be so classified in the DIFC.

The Court further held that neither the DIFC Insolvency Law nor any other DIFC Law had any provision relating to Joined Litigants or recognition of proceedings which involve them, whether or not the requirements of Article 2(a) of the Model Law are otherwise met. If the Joined Litigants were not classified as Debtors in the Abu Dhabi proceedings, they could not be so classified in the DIFC.

The application for recognition therefore failed for this additional reason and the application for a stay based on that also failed. There simply was no jurisdiction to recognise the Abu Dhabi proceedings, even if they had been brought by a Foreign Representative.

C. ISSUE 3: JURISDICTION TO STAY PROCEEDINGS IN THE DIFC

The significance of the difference between the location of an entity's centre of main interests and the location of an establishment arises because of the distinction drawn between recognition of a foreign proceeding as a foreign main proceeding and recognition of it as a foreign non-main proceeding.

Under Article 20(1) of the Model Law, there is an "automatic"[11] stay of proceedings concerning the debtor's assets, rights and liabilities/obligations where the foreign proceedings are recognised as main proceedings. Where recognition is given of the foreign proceedings as non-main proceedings, under Article 21 "*the Court may*", at its discretion grant such a stay. In practice, the Court held that the distinction is limited in its effect because of the terms of Article 20(4), which gives power to the Court to terminate such a stay, and Article 20(2) which provides that the scope, or termination, of the stay referred to in Article 20(1) applies in the same way as a moratorium under Article 88(2) of the DIFC Insolvency Law and does not affect any rights to take steps to enforce security. Article 88(2) of that Law provides that the Court may give leave for actions to be continued against the company subject to such terms as the court may impose. The essential criterion to be adopted by the Court is that it must do what is right and fair according to all the circumstances of the case. The effect of the "automatic" stay under Article 20 is effectively to put the burden of proof upon the party resisting a stay, whereas the burden may rest upon the party seeking a stay under Article 21.

In any event, the evidence put before the Court as to the centre of main interests and location of establishment of the 28 corporate bodies who are Joined Litigants was held to be unsatisfactory.

> *The Court took the view that on the facts of this case, it did not matter whether the issue of stay—if it had arisen for decision—would fall for decision under Article 20 or Article 21, because the result would have been the same.*

The Court took the view that on the facts of this case, it did not matter whether the issue of stay—if it had arisen for decision—would fall for decision under Article 20 or Article 21, because the result would have been the same.

11. The term is regularly (and arguably inaccurately) used in the literature in relation to the UNCITRAL Model Law which differs from the DIFC version in significant respects, including in relation to stays of proceedings.

In part, the Court's conclusion to that effect relied on aspects of the conduct of the Defendants in the DIFC proceedings and the Trustees which was specific to the case so will not be further considered here except in relation of matters of general principle beyond noting that such matters will have relevance in the Court's consideration of whether or not there should be a stay.

The Court noted that the Trustees had stated that:

> *"The process for review of claims is being carefully managed by the Abu Dhabi Court and will include submissions, meetings and detailed discussions with the Debtors and Banks surrounding such claims. The Trustee Panel also has the authority to appoint its own experts to review the claims, including independent forensic handwriting experts. In all respects, the restructuring process is being carefully and adeptly managed by both the Trustees and the Abu Dhabi Court"*

and that, notwithstanding any judgments of the DIFC Court, the Trustees will still have to review the underlying claim and cannot accept any orders of this Court made after the Commencement Date at face value. In consequence, the Trustees asserted that allowing the DIFC claims to run *"does more harm than good".*

The Court noted that the Trustees were effectively contending that the determination of liability in the Court of the chosen jurisdiction between the Banks and the borrowers to be valueless because the Trustee Panel had arrogated to itself the power to second-guess or override any such determination, subject to any grievance raised against their decision which would be heard by the Abu Dhabi Court.

The Court continued:

> *"That appears to me to be an irresponsible position to take, regardless of the position adopted in the Abu Dhabi proceedings and the desire to bring about a restructuring, if enough creditors agree."*

Given that the principal issue remaining in contention in two of the cases was the validity of HEAQ's guarantee which was also in contention in the other two, the Court observed:

> *"It cannot be said to be in the interest of the creditors for the assets of HEAQ to be unavailable to satisfy the debts of the borrowers/Joined Litigants, if there is a valid guarantee. The Trustees, exercising their functions in a responsible manner would be expected to do all that they could to maximise the assets available for distribution to the creditors, whether there is ultimately to be a restructuring or a liquidation. The existence of the disputed claim against HEAQ which would, if established, result in the availability of greater funds for the creditors requires that matter to be properly investigated."*

> *There could be no doubt in the mind of any objective observer that the DIFC Court was better equipped to determine issues of forgery—with the benefit of disclosure, cross examination and expert evidence—than the Trustees with the limited right of a grievance procedure involving the Abu Dhabi Court.*

The Court observed that while HEAQ maintained that he was not a party to this guarantee because he said that his signature was forged

and he was not therefore bound by the jurisdiction clause in favour of the DIFC, there could be no doubt in the mind of any objective observer that the DIFC Court was better equipped to determine issues of forgery—with the benefit of disclosure, cross examination and expert evidence—than the Trustees with the limited right of a grievance procedure involving the Abu Dhabi Court in the event of a decision by the Trustees that there was or was not any liability on HEAQ under the alleged guarantees.

There was therefore every reason for the proceedings against HEAQ to continue in the DIFC Courts regardless of any other consideration.

D. ISSUE 4: ASSISTANCE AND CO-OPERATION

Reliance was placed by Counsel for the Trustees, if recognition were refused, on Articles 25-27 of the Model Law. Under Article 25:

> *"in matters referred to in Article 1* [assistance sought in the DIFC by a foreign court or a foreign representative in connection with a foreign proceeding]*, the Court may cooperate with foreign courts or foreign representatives either directly or through a DIFC insolvency office-holder".*

The Court held that while it was open to the Court to stay the existing proceedings as a form of cooperation or assistance in connection with an insolvency proceeding taking place abroad, it was hard to think of any reason why the Court should do so if the proceedings in question were not capable of recognition as a "foreign proceeding" for any of the reasons set out above, even if there were a relevant corporate debtor in respect of which cooperation could be sought. As the DIFC Insolvency Law made provision for a stay to be granted in specified circumstances, it would need very good reason to grant a stay where the preconditions for a stay in accordance with that Law had not been not met.

As the DIFC Insolvency Law made provision for a stay to be granted in specified circumstances, it would need very good reason to grant a stay where the preconditions for a stay in accordance with that Law had not been not met.

Where the law had provided for circumstances in which, in the case of the insolvency of a foreign company, a stay should be imposed, it would be odd to impose a stay in other circumstances which would result in achieving by the back door what was not permitted by the front. Where the proceedings were incapable of recognition because there was no foreign representative or where the only insolvent debtor, recognised as such in the foreign court, was an individual to whom the statute does not apply, there was no room for reliance on any part of Schedule 4, whether in relation to cooperation or otherwise. The DIFC Insolvency Law provisions were of no application to the bankruptcy of an individual in Abu Dhabi proceedings and there was no reason, as a matter of judicial policy, to find some other way of achieving the same result. What good reason could there be for granting a stay against him, or companies which he owns or in which he has a majority interest, or guarantors of the liability of such companies?

Any restructuring plan or liquidation process would in fact be facilitated by the DIFC Court's decisions on liability, subject only to the additional expense involved if the Trustees decided to contest claims made against the borrowers or on the construction contract or were made subject to orders for costs in favour of successful claimants. The incurring of cost in ascertaining the assets and liabilities of insolvent debtors, was however part of any insolvency process and is an inevitable feature of it. Lawyers' and accountants' fees regrettably consume assets which would otherwise be available to creditors but to some extent the quantum of such expenditure lay in the hands of the Trustees and the decisions they take as to admission of debts. Whatever applications were now made for immediate judgment in the DIFC proceedings, the Trustees would have time to consider whether they were well made and whether to incur any expenditure in opposing them and racking up costs on their side as well as increasing the costs of the Banks or the remaining DIFC Claimant.

E. ISSUE 5: DISCRETION TO STAY UNDER THE COURT'S CASE MANAGEMENT POWERS

The last powers of the DIFC Court to which the Claimants appealed were its case management powers, but the Court held that that involved consideration of the same factors set out above. If there was no basis for the exercise of any discretion in favour of the Claimants in the context of the DIFC Insolvency Law or other applicable statutory provision, there could be none in the exercise of case management powers.

Conclusion

The decision provides some very helpful guidance on an issue of practical importance arising in inter-emirate commercial litigation. It is a good example of the DIFC Court carefully defending its jurisdiction in circumstances where repeated attempts have been made to avoid having the underlying issues determined by the Court but respecting the position of the other Courts in the UAE.

As a matter of law, the judgment illustrates a careful and nuanced approach to the provisions in the UNCITRAL Model Law on Cross-Border Insolvency as enacted in the DIFC Insolvency Law. The DIFC Court has resisted an overly broad application of the principle of recognition in the Model Law. As such, parties may not rely on insolvency proceedings in another Court to delay or derail DIFC Court proceedings. Where such insolvency procedures are on foot (whether in another emirate or another jurisdiction), the DIFC Court will not simply impose an "automatic" stay of its proceedings, but rather will give careful attention to the provisions of the DIFC Insolvency Law, the nature of the "foreign proceedings", the conduct of the parties and whether a stay of proceedings will serve any useful commercial purpose.

Further, when Articles 20 and 21 of the Model Law (the provisions governing recognition of foreign proceedings) are not engaged, the Court is unlikely to grant relied based on broader notions of "comity" or wider case management powers. This significantly reduces the area of potential legal uncertainty. The approach to the Model Law reflected in this decision will clearly limit the scope for tactical satellite litigation. As such, the judgment is in keeping with the trend of recent cases such as the Court of Appeal decision in *Lakhan v. Lamia*.[12]

It should be noted that the defendants have requested leave to appeal at the DIFC Court of Appeal.

12. *Lakhan v. Lamia* [2021] DIFC CA 001 available at: https://www.difccourts.ae/rules-decisions/judgments-orders/court-appeal/lakhan-v-lamia-2021-difc-ca-001.

أكدت محكمة مركز دبي المالي العالمي في أحد أول توضيحاتها لتأثير الجدول الرابع لقانون الإعسار والذي يعتبر تطبيقا لقانون الأونسترال النموذجي للإعسار عبر الحدود وتفاعله مع قانون الإفلاس في دولة الإمارات العربية المتحدة على أن قانون الأونيسترال النموذجي على مركز دبي المالي العالمي يطبق فقط على إعسار الشركات. وقد عمل المحررون مستشارين قانونيين في هذه القضية. ووافقت المحكمة على النظر بعناية في مسألة اختصاصها للاعتراف بالإجراءات القانونية غير المتعلقة بالمركز ودعمها (بما في ذلك المحاكم الشقيقة في الإمارات العربية المتحدة). إن مجرد كون إجراء أجنبي ما متعلق بصورة عامة بالإعسار لا يجعل الاعتراف به تلقائيا. وأكدت المحكمة، فيما يتعلق بالمسائل الخاضعة للسلطة التقديرية، أن المحكمة على الأغلب ستنظر بعناية بسلوك الأطراف والفوائد العملية (أو غيرها) التي تعود على الأطراف من ممارسة سلطتها التقديرية في إصدار قرار بمنح أو استمرار تعليق إجراءات مركز دبي المالي العالمي.

BIOGRAPHY

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Oman's New Personal Data Protection Law

On 9 February 2022, Oman issued its first comprehensive personal data protection law to regulate the processing of personal data. It is a highly significant legislative development and grants significant data protection rights to individuals in Oman. In this article, we highlight some of the most noteworthy provisions prescribed in the Personal Data Protection Law.

Le 9 février 2022, Oman a publié sa première loi complète sur la protection des données personnelles afin de réglementer le traitement des données personnelles. Il s'agit d'un développement législatif très important qui accorde des droits importants aux personnes en Oman. Dans cet article, nous mettons en lumière certaines des dispositions les plus remarquables prescrites par la loi sur la protection des données personnelles.

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Promulgated by Oman Sultani Decree No. 6/2022, the Personal Data Protection Law (**DPL**) will come into force one year after its publication in the Official Gazette (i.e., on 13 February 2023). The executive regulations, to be issued by the Ministry of Transport, Communications and Information Technology (**MOTCIT**), will supplement the provisions of the DPL and is expected to be issued prior to the DPL coming into force (the **"Executive Regulations"**). The DPL replaces and repeals chapter 7 of the Electronic Transactions Law (Oman Sultani Decree No. 69/2008, as amended), which included limited and inadequate provisions relating to the processing of personal data.

The DPL is comprised of 32 Articles divided into five chapters as follows:

- Chapter 1: Definitions and general provisions (Articles 1-6)
- Chapter 2: Duties and powers of the MOTCIT (Articles 7-9)
- Chapter 3: Rights of the owner of personal data (the "**Owner**") (Articles 10-12)
- Chapter 4: Obligations of the controller and the processor (Articles 13-23)
- Chapter 5: Penalties for the violation of the provisions of the DPL (Articles 24-32)

1 Application of the DPL

The DPL applies to the processing of personal data, which is defined as *"any data through which an individual is identified or may be identified whether directly or indirectly by referring to one or more identifiers..."*.[1] This includes identifiers such as an individual's name, civil identification number, electronic identifying data or other data specific to an individual's genetic, physical, mental, psychological, social, cultural or economic identity. Processing includes collection, recording, analysis, organization, storage, amendment, modification, retrieval, review, coordination, consolidation, withholding, removal,

1. DPL, art. 1.

destruction or disclosure, by sending distributing, transporting, transferring or otherwise making available.[2]

The provisions of the DPL do not apply to the processing of personal data in the following cases:[3]

a) protection of national security or public interest;

b) execution by the units of the Administrative Apparatus of the State and other public legal persons of their competencies prescribed to them by law;

c) enforcement of a legal obligation imposed on the controller under any law, judgment, or court decision;

d) protection of the economic and financial interests of the State;

e) protection of a vital interest of the Owner;

f) detection or prevention of a crime on the basis of an official written request by the investigating authorities;

g) execution of a contract to which the Owner is a party;

h) if the processing of data is carried out in a personal or a family context;

i) for the purposes of historical, statistical, scientific, literary, or economic research, by those authorized to carry out such works, provided that no indication or reference related to the Owner is used in their published research and statistics, to ensure that the personal data is not attributed to a defined or identifiable natural person; and/or

j) if the data is publicly available in a manner that does not violate the provisions of the DPL.

2 Rights of the Owner

A. CONSENT

> *The DPL requires personal data to be processed within the framework of transparency, honesty, and respect for human dignity. To this effect, personal data may not be processed without the express consent of the Owner.*

The DPL requires personal data to be processed within the framework of transparency, honesty, and respect for human dignity. To this effect, personal data may not be processed without the express consent of the Owner.[4] Any request for the processing of personal data must be in writing, in a clear, explicit and understandable manner. Similarly, processing a child's personal data without the approval of their guardian is not permitted, except if such processing of personal data is considered to be in the child's best interests.[5]

B. SENSITIVE PERSONAL DATA

Under the provisions of the DPL, there is a general restriction on the processing of certain data without obtaining an authorization from the MOTCIT.[6] These are the processing of genetic and biometric data, health data, or data relating to ethnic origin, sexual life, political or religious opinions or beliefs, criminal convictions, or those data relating to security measures.[7]

C. OTHER RIGHTS

Owners also enjoy a range of rights in relation to the processing of their personal data under the DPL. This includes the right:

- to obtain a copy of their processed personal data;
- to amend, update or withhold personal data;
- to revoke their consent given in respect of the processing of their personal data;
- to request the transfer of their personal data to another controller;
- to request the deletion of their personal data; and
- to being notified of any breach or infringement of their personal data and the measures taken in this regard.[8]

Importantly, the Owner has the right to submit a complaint to the MOTCIT if the Owner considers that his or her personal data have not been processed in accordance with the provisions of the DPL.[9]

We expect that the Executive Regulations will provide further guidance on the exercise of these rights by the Owners.

3 Obligations of Controllers and Processors

The DPL sets certain obligations applicable on Controllers and Processors. The DPL defines a Controller as *"the person who determines the purpose and means of the processing of personal data, and carries out the processing himself or entrusts it to someone else"* [10] and a Processor as *"the person who processes personal data on behalf of the controller".*[11]

For example, prior to processing any personal data, Controllers must inform the owner of personal data in writing of the following information: [12]

2. *Ibid.*
3. *Ibid.*, art.3.
4. *Ibid.*, art. 10.
5. *Ibid.*, art. 6.
6. *Ibid.*, art. 5
7. *Ibid.*
8. *Ibid.*, art. 11.
9. *Ibid.*, art. 12.
10. *Ibid.*, art. 1.
11. *Ibid.*
12. *Ibid.*, art. 14.

a) the controller and processor details;
b) the contact details of the personal data protection officer;
c) the purpose of processing personal data and the source from which the data was collected;
d) a comprehensive and accurate description of the processing of personal data and its procedures, and the degrees of disclosure of the personal data;
e) the rights of the Owner, including the right to access, amend, transfer, and update the data; and
f) any other information that might be necessary to fulfill the processing requirements.

Controllers are also required to notify the MOTCIT and the Owner of any breach which may result in the destruction, alteration or unlawful disclosure, access, and processing of personal data.

Controllers are also required to notify the MOTCIT and the Owner of any breach which may result in the destruction, alteration or unlawful disclosure, access, and processing of personal data.[13] Furthermore, the DPL requires a controller to appoint a Personal Data Protection Officer.[14] The appointment must be made in accordance with the conditions of the Executive Regulations.

Other obligations imposed on both controllers and processors include:

- maintaining records;[15]
- ensuring confidentiality of personal data;[16]
- cooperating with MOTCIT and providing any information and documents required by MOTCIT to exercise its authority under the DPL;[17] and
- appointing an external auditor at the request of MOTCIT to ensure that processing of personal data is made in accordance with the DPL.[18]

Personal data may only be transferred outside Oman in accordance with the controls and measures specified in the Executive Regulations

13. *Ibid.*, art. 19.
14. *Ibid.*, art. 20.
15. *Ibid.*, art. 17.
16. *Ibid.*, art. 21.
17. *Ibid.*, art. 18.
18. *Ibid.*, art. 16.

4 Transfer of Data

Personal data may only be transferred outside Oman in accordance with the controls and measures specified in the Executive Regulations.[19] That being said, the DPL prohibits the transfer of personal data where data is being processed contrary to the provisions of the DPL or where it would result in harm to the Owner. [20]

5 Penalties

To protect the rights of the Owner, the MOTCIT may issue warnings to controllers and processors who violate the provisions of the DPL, order correction or removal of personal data, suspend the processing of personal data either temporarily or permanently, and suspend the transfer of data to another country or an international organization.[21]

The DPL contains a wide range of fines in the event of non-compliance, the most substantial being in the range between OMR 100,000-OMR 500,000 for the violation of Article 23 of the DPL which relates to data transfers.[22]

It is worth noting that the penalties provided in the DPL are without prejudice to any more severe penalty prescribed under the Penal Code (Oman Sultani Decree No. 7/2018) or any other law.[23] Penalties for breach of the Penal Code extend to both fines and imprisonment.

6 Sectoral Laws

While the DPL repeals chapter 7 of the Electronic Transactions Law (Oman Sultani Decree No. 69/2008, as amended), certain sectoral laws and regulations will continue to apply to the relevant sectors to the extent not inconsistent with the DPL. Examples of laws that will still apply are provided below:

A. THE TELECOMMUNICATIONS LAW

Subject to certain exceptions, under Oman Sultani Decree No. 30/2002

19. *Ibid.*, art. 23.
20. *Ibid.*
21. *Ibid.*, art. 8.
22. *Ibid.*, art. 29.
23. *Ibid.*, art. 24.

(the "**Telecommunications Law**"), it is not permissible to monitor, inspect, or take advantage of, any type of "telecommunications", or to reveal the confidentiality of such telecommunications, without a prior order from the concerned Court.[24] "Telecommunications" covers:

> *"every conveyance, emission, transmission or reception of signals or symbols or signs or texts or visual and non-visual images or sounds or data or information of any nature by wire, radio, optical system, or other electro-magnetic or electronic systems."*[25]

In addition, internet service providers must maintain confidentiality in respect of the services provided to customers and customer data. Internet service providers are prohibited from compromising or disclosing customer data unless ordered to do so by a court.[26]

Subject to certain exceptions, it is an offence under Article 61(2)(B) of the Telecommunications Law for a person who uses telecommunications equipment or media (*inter alia*) to disclose the confidentiality of any data related to the message content or its sender or the addressee, that might have come to their knowledge by reason of using such equipment or media.[27]

B. TELECOM CONFIDENTIALITY RULES

...telecommunications licence holders in Oman may only request private data from customers if the data is necessary to provide the service requested by that customer.

Under Decision No. 113/2009 Issuing Regulations on Protection of Confidentiality and Privacy of Beneficiary Data (the "Telecom Confidentiality Rules"), telecommunications licence holders in Oman may only request private data from customers if the data is necessary to provide the service requested by that customer. The licence holder must inform the customer of the purpose of the request and of the possibility of the licence holder processing or retaining the data.[28]

Licence holders must obtain the customer's written consent to exchange or publish the customer's data with a subsidiary company or a third party.[29] The licence holder must also ensure the exchanged or published data is only used for the specified purpose and within the permitted limits;[30] the licence holder may also not lease or sell customer data to any person or sell customer data to any person or entity that is not involved in providing the relevant service to the customer[31] or request information that is not related to the provision of the relevant services.[32] In addition, under Article 2, telecommunications companies must:

a) use customer data only for the purposes specified in, and in compliance with, the Telecom Confidentiality Rules;

b) limit access to authorized employees;

c) take all necessary technical and professional measures to protect the licence holder's systems and networks and prevent access or disclosure by unauthorized employees;

d) issue procedures/regulations, which must be pre-approved by the Telecommunications Regulatory Authority (**TRA**), to be followed by the licence holder to protect confidentiality and privacy (which procedures/regulations are to be published on the licence holder's website and provided to customers requesting service);

e) update customer data when needed;

f) inform the customer of any person or entity from which the licence holder obtains the customer's data and the period during which the licence holder will retain the data;

g) inform the customer of any breaches or safety hazards affecting or likely to adversely affect the safety of their data or which may lead to disclosure of the data to third parties;

h) permit the TRA to access the customer's data or disclose the data upon the TRA's request in accordance with the Telecommunications Law; and

i) delete or block any data that is inconsistent with the Telecom Confidentiality Rules.

The Telecom Confidentiality Rules prohibit telecommunications companies from retaining customer data for more than three months after the customer's contract has expired.

The Telecom Confidentiality Rules prohibit telecommunications companies from retaining customer data for more than three months after the customer's contract has expired unless authorized to do so by the TRA.[33]

Under Article 6, a licence holder is responsible for actions of and breaches by third parties with whom it exchanges the customer's data under the Telecom Confidentiality Rules.

C. OTHER SECTORAL LAWS

There are also other sectoral laws that contain limited data and privacy protection provisions, such as the Banking Law (Oman Sultani Decree No. 114/2000, as amended) and the Law Governing the Practice of the Medical Profession and Allied Health Professions (Oman Sultani Decree No. 75/2019, as amended).

24. Telecommunications Law, art. 5.
25. *Ibid.*, art. 1.
26. *Ibid.*, art. 37 bis 1.
27. *Ibid.*, art. 61(2)(B).
28. Telecom Confidentiality Rules, art. 1.
29. *Ibid.*, art.3.
30. *Ibid.*
31. *Ibid.*, art. 5 (a).
32. *Ibid.*, art. 5 (b).
33. *Ibid.*, Art. 5 (c).

في 9 فبراير 2022، أصدرت سلطنة عمان أول قانون شامل لها متعلق بحماية المعلومات الشخصية لتنظيم معالجة البيانات الشخصية. إنه تطور تشريعي ملحوظ ينص على حقوق مهمة لحماية المعلومات للأفراد في عمان. نبرز في هذه المقالة أهم الأحكام التي ينص عليها قانون حماية المعلومات الشخصية.

BIOGRAPHY

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The Ongoing Validity of an Arbitration Agreement under UAE Law – A Conundrum

An arbitration agreement used to be deemed exhausted upon its first invocation by either of its parties under Articles 203 to 218 of UAE Federal Law No. 11/1992 on the Code of Civil Procedure. UAE Federal Law No. 6/2018 on Arbitration, in effect since June 2018, repealed Articles 203 to 218 of the Code of Civil Procedure. Parties to an arbitration are now permitted under Article 54 of the UAE Federal Arbitration Law to use the same arbitration agreement more than once, even if an arbitral award has been set aside. This article discusses the erstwhile and present-day views of the UAE Courts in relation to the validity of an arbitration agreement once an arbitral award has been set aside under the UAE Federal Arbitration Law.

Une convention d'arbitrage était réputée épuisée lors de sa première invocation par l'une de ses parties en vertu des articles 203 à 218 de la loi fédérale des Émirats arabes unis n ° 11/1992 sur le Code de procédure civile. La loi fédérale des Émirats arabes unis n ° 6/2018 sur l'arbitrage, en vigueur depuis juin 2018, a abrogé les articles 203 à 218 du Code de procédure civile. Les parties à un arbitrage sont désormais autorisées, en vertu de l'article 54 de la loi sur l'arbitrage des Émirats arabes unis, à utiliser la même convention d'arbitrage plus d'une fois, même si une sentence arbitrale a été annulée. Cet article traite des points de vue anciens et actuels des tribunaux des Émirats arabes unis concernant la validité d'une convention d'arbitrage une fois qu'une sentence arbitrale a été annulée en vertu de la loi sur l'arbitrage des Émirats arabes unis.

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1 Introduction

Prior to the introduction of the UAE Federal Law No. 6/2018 (the "**UAE Arbitration Law**"), UAE arbitrations were governed by Articles 203-218 (the "**CPC Articles**") of Law No. 11/1992 on the Code of Civil Procedure (**CPC**), pursuant to which an arbitration agreement was deemed to be exhausted upon issuance of an arbitral award. This was regardless of the award being enforced or nullified, which raised concerns with litigants opting to arbitrate and provisioning for an arbitration clause within their agreement. Many questions were raised regarding party autonomy and the principle of *pacta sunt servanda* where an arbitration agreement was deemed to have been exhausted, once triggered, and the final award being subject to nullification.

With the advent and introduction of the UAE Arbitration Law, which repealed the CPC Articles, the position adopted by practitioners and judges has become arbitration friendly, in line with the policies of the UAE to market itself as an arbitration-friendly jurisdiction. The UAE Arbitration Law allows parties to initiate another arbitration under the same arbitration agreement where an arbitral award has been nullified, without the risk of the UAE Courts considering the arbitration clause to have been exhausted, subject to two exceptions as will be discussed in this article.

This article further aims to discuss the erstwhile and present-day views of the UAE Courts in relation to the validity of an arbitration agreement once an arbitral award is set aside under the UAE Arbitration Law.

2 The UAE Courts' Perspective

A. PRIOR TO THE UAE ARBITRATION LAW

> *For a long time, UAE Courts held that parties could only use an arbitration clause once, and if an arbitral award was nullified, the parties could not use the same arbitration clause to initiate another arbitration, unless the parties concluded a new arbitration agreement.*

As discussed above, CPC Articles 203 to 218 governed arbitrations prior to the coming into force of the UAE Arbitration Law. There had been a growing concern and disconnect between the parties opting to arbitrate owing to the strict position adopted by UAE Courts towards arbitration agreements and their validity. For a long time, UAE Courts held that parties could only use an arbitration clause once, and if an arbitral award was nullified, the parties could not use the same arbitration clause to initiate another arbitration, unless the parties concluded a new arbitration agreement.

> *The UAE Courts had applied the CPC Articles in various judgments to conclude that an arbitration agreement could not be resorted to more than once.*

The UAE Courts had applied the CPC Articles in various judgments to conclude that an arbitration agreement could not be resorted to more than once. For example, the Dubai Court of Cassation in its Judgment No. 298/2010 upheld the appealed judgment before it. In this case, a claimant had filed an arbitration before an arbitral tribunal. The tribunal dismissed the case on the grounds that the claimant had failed to satisfy the preconditions to arbitration.[1] The claimant subsequently filed a lawsuit before the Dubai Court of First Instance since, under the CPC Articles, a party was not permitted to use the same arbitration agreement more than once to arbitrate. The Dubai Court of First Instance held in favour of the claimant. The respondent appealed this ruling before the Dubai Court of Appeal, arguing the presence and validity of an arbitration agreement, which the Court of Appeal rejected. The respondent appealed again before the Court of Cassation on the grounds that Dubai Courts lacked jurisdiction over the case, since there was a valid arbitration agreement between the parties, and by filing a case before Dubai Courts, the claimant was considered to have disregarded the arbitration clause and to have revoked it unilaterally when, in fact, the parties had mutually agreed to be bound by it.

The Court of Cassation upheld the appealed judgment on the grounds that the arbitration agreement had been exhausted after the decision of the arbitral tribunal to dismiss the case on the grounds that the claimant had failed to satisfy the preconditions of the arbitration. Furthermore, the decision of the arbitral tribunal exhausted the arbitrator's authority and prohibited any other arbitrator from adjudicating the same dispute, regardless of the arbitral award being enforced or set aside, which in turn exhausted the arbitration agreement and prohibited the parties from arbitrating under the same arbitration agreement again, unless a new arbitration agreement was concluded between the parties. The Court of Cassation further held that absent a new arbitration agreement, the Courts would retrieve their inherent jurisdiction, wherein either of the litigants would have the right to resort to the Courts to settle the dispute. Consequently, the parties could no longer invoke the arbitration agreement.

A similar view was taken by the Court of Cassation[2] in its Judgment No. 263/2007, a case in which it overruled an appealed judgment and referred it back to the Court of First Instance, since the Dubai Court of First Instance and Dubai Court of Appeal erred in applying the law and considered the arbitration agreement valid after an award had been rendered.

In this given case, an arbitral award was nullified and one of the

1. Dubai Court of Cassation No. 298/2010 (1 January 2011) – Commercial Appeal.
2. Dubai Court of Cassation No. 263/2007 (3 February 2007) – Civil Appeal.

parties filed the same dispute again before the Courts. The Court of First Instance decided not to adjudicate the case due to the presence of an arbitration agreement. The Court of Appeal upheld Court of First Instance's Judgment. However, the Court of Cassation overturned the Court of Appeal's decision on the grounds that an award had been rendered, and that an arbitration agreement could be applied only once.

The two Court of Cassation judgments mentioned above established that once an arbitral award has been issued, the underlying arbitration agreement was to be considered to have satisfied its objective and thereafter, the arbitrator who furnished the award would be considered to have exhausted his or her authority in regards to the case, regardless of whether the award was enforced or nullified. Hence, it is unequivocal that the CPC Articles prohibited the filing of a second arbitration under the same arbitration agreement.

B. POST UAE ARBITRATION LAW

After the UAE Arbitration Law came into force in 2018, the UAE Courts took a contrasting stance to the position it had under the CPC Articles. This change of view was primarily due to the introduction of specific provisions and framework, in line with the global consensus on arbitration agreements. The UAE Arbitration Law under Article 54(4) stipulates that, even after an arbitral award is nullified, the underlying arbitration agreement will remain valid unless:

> (i) otherwise agreed by the parties; or
>
> (ii) the setting aside was based on an arbitration agreement that does not exist, has lapsed, is void or incapable of being performed.[3]

Furthermore, Article 59 stipulates that the UAE Arbitration Law is applicable to any arbitration pending at the time of its entry into force, including any arbitration arising out of a previously existing arbitration agreement. As per the same Article, all proceedings that took place under any prior legislation remain valid.

The UAE Courts have applied the stipulations in Articles 54(4) and 59 of the UAE Arbitration Law. This was demonstrated in a case raised before the Court of Cassation,[4] wherein an appellant (the respondent in an arbitration) had filed a petition to set aside an arbitral award issued in favour of the claimant. After the award had been set aside, the claimant filed a case pertaining to the same dispute with the Courts; however, the defendant invoked the presence of an arbitration agreement. The Dubai Court of First Instance, on 31 January 2018 (which was prior to the issuance of the UAE Arbitration Law) dismissed the defendant's plea. The defendant appealed the judgment before the Court of Appeal, which in turn upheld the ruling of the Dubai Court of First Instance on grounds that the arbitration agreement had been exhausted after having satisfied its objectives.

The defendant appealed the Court of Appeal's judgment objecting to the jurisdiction of the Courts due to a valid arbitration agreement. The defendant argued that the Court of Appeal had erroneously applied the law by disregarding the UAE Arbitration Law, which had repealed the CPC Articles. Moreover, the defendant relied on Articles 54(4) and 59 of the UAE Arbitration Law in its arguments. Furthermore, the defendant argued that the UAE Arbitration Law sets forth that it must apply to any pending arbitration at the time of its entry into force.

The Court of Cassation dismissed the defendant's plea and upheld the appealed judgment. Moreover, Court settled that the argument put forward by the appellant was unfounded due to the conflict of laws in terms of time. The Court of Cassation recognized the UAE Arbitration Law; however, in the given case, the Dubai Court of First Instance dismissed the defendant's plea regarding the presence of an arbitration agreement before the entry of the UAE Arbitration Law into force, i.e., when the CPC Articles were still in force.

The Court of Cassation further stated that a law usually governs the factual and legal standings established between the date of its entry into force and the date of its abolition, wherein a new law would apply in a direct effect to the facts and legal standings established subsequent to its entry into force or to incomplete legal standings. Furthermore, the Court of Cassation asserted that completed legal standings are subject to the law under which the contract that formed the legal standings was concluded, unless the new law has imposed specific peremptory rules on these legal standings. The new law would also be applicable to whatever remains incomplete of the legal standings. The Court of Cassation further stated that Article 54 of the UAE Arbitration Law is effective and valid only (i) from the date the said law entered into force; and (ii) on judgments issued under the UAE Arbitration Law. Additionally, the Court of Cassation provided that established rights and legal standings that had been completed prior to the entry of the UAE Arbitration Law into force are not subject to it, since the CPC Articles are contrary, in principle, to the UAE Arbitration Law.

The Court of Cassation settled that since the award was set aside prior to the UAE Arbitration Law's entry into force, the agreed legal standings that had arisen—and whose effects had been completed before the UAE Arbitration Law's entry into force—were subject to the CPC Articles.

In the case presented before the Court of Cassation, it was established that the litigants had previously resorted to arbitration, wherein the award rendered was nullified. The Court of Cassation settled that since the award was set aside prior to the UAE Arbitration Law's entry into force, the agreed legal standings that had arisen—and whose effects had been completed before the UAE Arbitration Law's entry into force—were subject to the CPC Articles, since it was the law in force at the time the legal standings of the litigants were acquired.

Additionally, the Court of Cassation held that the stipulation of Article 59 of the UAE Arbitration Law, which provides its applicability to any arbitration which is pending at the time of its entry into force even if it was based on a previous arbitration agreement, was not applicable in this case, since the arbitration was complete, not pending, and the provisions of the UAE Arbitration Law did not have a retroactive effect.

The Dubai Court of Cassation's judgment confirms the Courts' recognition of Articles 54(4) and 59 of the UAE Arbitration Law. However, Article 54(4) can only be invoked when a legal standing is acquired under the UAE Arbitration Law, and/or when an arbitration was pending at the time of its entry into force, albeit arising out of a previously existing arbitration agreement.

3. UAE Federal Law No. 6/2018.
4. Dubai Court of Cassation No. 903/2018 (May 12, 2019) – Commercial Appeal.

3

Conclusion

Contrary to the repealed Articles 203 to 218 of the CPC, the UAE Arbitration Law permits parties, absent two exceptions, to commence a new arbitration after the rendered award is set aside, under the same arbitration agreement, without risk of the Courts rendering the arbitration agreement as exhausted.

كانت اتفاقيات التحكيم في السابق تعتبر مستنفذة عند أول احتجاج بها من قبل أي من الأطراف بموجب المواد 203 إلى 218 من القانون الاتحادي لدولة الإمارات العربية المتحدة رقم 1992\11 المتعلق بالإجراءات المدنية. وقد ألغى القانون الإتحادي رقم 2018\6 لدولة الإمارات العربية المتحدة المتعلق بالتحكيم والذي دخل حيز التنفيذ في يونيو 2018، المواد 203 إلى 218 من قانون الإجراءات المدنية. يسمح الآن لأطراف التحكيم، بموجب المادة 54 من قانون التحكيم لدولة الإمارات العربية المتحدة، باستخدام اتفاقية التحكيم ذاتها أكثر من مرة حتى وإن تم إبطال قرار التحكيم. تناقش هذه المقالة وجهات نظر المحاكم الإماراتية السابقة والحالية فيما يتعلق بصلاحية اتفاقيات التحكيم عندما يتم إبطال حكم تحكيمي بموجب قانون التحكيم الإماراتي.

BIOGRAPHY

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Roaa is involved in multiple high-stake disputes subject to the UAE Law. Her practice deals in both domestic and international arbitrations and complex cross-border disputes. She is well-versed in various arbitration rules such as Dubai International Arbitration Centre (DIAC), International Chamber of Commerce (ICC), UNCITRAL rules, including DIFC-LCIA and has assisted in arbitration matters before DIAC, ADCCAC, ICC.
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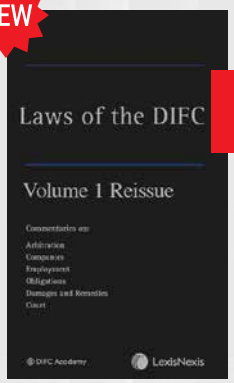

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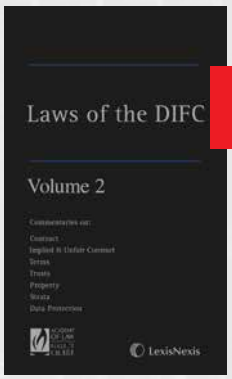

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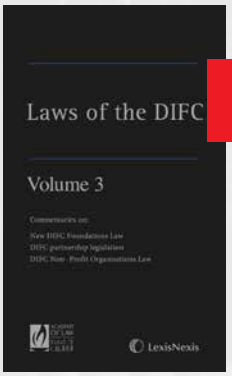

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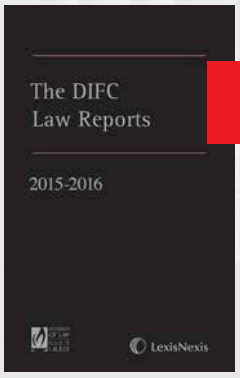

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The Abu Dhabi Global Market Courts: A Five-Year Appraisal

2021 saw the fifth anniversary of the first disputes registered before the Courts of the Abu Dhabi Global Market (the "**ADGM Courts**"). This article considers various aspects of the ADGM Courts, including their organization, jurisdiction, and connectivity to other domestic and international courts for the purposes of enforcement. It also looks at highlights of the Courts' caseload over its first five years, including the NMC litigation and the related dispute involving its founder Dr B.R. Shetty, before reflecting on the Courts' future development.

2021 a marqué le cinquième anniversaire des premiers litiges enregistrés devant les tribunaux de l'« Abu Dhabi Global Market » (les « tribunaux ADGM »). Cet article examine divers aspects des tribunaux ADGM, y compris leur organisation, leur compétence et leur connexion avec d'autres tribunaux nationaux et internationaux aux fins de l'exécution. Il étudie également les faits saillants de la charge de travail des tribunaux au cours de leurs cinq premières années d'existence, y compris le litige NMC et le différend connexe impliquant son fondateur, le Dr B. R. Shetty, avant de s'intéresser au développement futur de ces tribunaux.

Peter Smith
Senior Associate
Charles Russell Speechlys

1 Background of the ADGM Courts

A. OVERVIEW

The Abu Dhabi Global Market (**ADGM**) is a financial free zone in the heart of Abu Dhabi, the capital of the United Arab Emirates. Like the Dubai International Financial Centre (**DIFC**), the ADGM is, in the memorable expression of a previous chief justice of the DIFC Courts, a "*common law island in a civil law ocean*". Whereas the DIFC applies

its own legal system within its jurisdiction, the ADGM directly applies a modified form of English civil and commercial law set out in the Application of English Law Regulations 2015 instead of the civil and commercial laws applied in the rest of the Emirate of Abu Dhabi and the UAE more generally. The incorporated English law is supplemented by the ADGM's own financial services rules and commercial regulations covering matters like company law, data protection, employment, insolvency and real property, building a corpus of ADGM law.

In addition to the Financial Services Regulatory Authority and the companies' Registration Authority, the ADGM has its own civil and commercial courts system: the ADGM Courts. The ADGM Courts act in several capacities. Principally, the Court of First Instance (**CFI**) Commercial and Civil Division hears high-value and complicated civil and commercial claims; it is set up in ways similar to the English High Court of Justice. The Small Claims Division specializes in claims of up to USD 100,000; there is a separate Employment Division that has the function of an employment tribunal. The ADGM Court of Appeal provides a final appellate court and there is no further right of appeal to the UAE's Federal Union Supreme Court from its decisions.

The ADGM Courts' bench is eminent. Judges are drawn from around the common law world, including Australia, New Zealand, Hong Kong and the UK. The Chief Justice is Lord Hope of Craighead KT, the first Deputy President of the UK Supreme Court. The ADGM Court Procedure Rules[1] and accompanying Practice Directions[2] are similar to the English Civil Procedure Rules, which have persuasive authority before the Courts. The ADGM Courts Regulations 2015[3] (as amended) set out the operating rules of the Courts, drawn from English, Scots and Australian Federal law. The Court process has aimed to be universally digital from the start: cases are filed and managed online, with hearings conducted remotely by default under a Protocol for Remote Hearings.[4]

The Court process has aimed to be universally digital from the start: cases are filed and managed online, with hearings conducted remotely by default under a Protocol for Remote Hearings.

B. ORGANISATIONAL DEVELOPMENTS

Since the Courts' launch, there have been a number of innovations and developments in the services offered.

- From the outset, the ADGM has marketed itself as a "preferred global seat of arbitration".[5] The Arbitration Regulations 2015 form part of ADGM law and are drawn from the UNCITRAL Model Law. In 2018, the ADGM launched its Arbitration Centre,[6] a state-of-the-art facility within the ADGM site open to any parties (whether or not involved in an ADGM-seated arbitration) who wish to use it. In April 2021, the International Court of Arbitration of the International Chamber of Commerce (**ICC**) expanded its representative office in the ADGM to a case management secretariat able to administer locally arbitrations between parties across the MENA region. The ADGM can therefore be a seat and a physical venue for arbitrations by parties from around the world.

In April 2019, the ADGM Courts announced the establishment of its court-annexed mediation service, designed to help parties reach a cost-effective and expeditious resolution of disputes as an alternative to court proceedings and arbitration.

- In April 2019, the ADGM Courts announced the establishment of its court-annexed mediation service, designed to help parties reach a cost-effective and expeditious resolution of disputes as an alternative to court proceedings and arbitration. Mediators are drawn from the Courts' roster,[7] the service can be controlled by the parties, and is free, confidential, and non-adversarial (the mediation is conducted on a 'without prejudice' basis so no documents or information disclosed in the mediation can be used in any subsequent litigation or arbitration). The process is set out in Practice Direction 13 and can be accessed by the parties' consent before or after a claim is brought in the Courts, or upon the order of the Court.
- Also in 2019, the Courts introduced their Litigation Funding Rules 2019, the first of their kind[8] in the Middle East and Africa. The Rules were devised in response to growing interest of parties in arbitration and litigation in third party funding and the central concern that any funding agreement should be enforceable, particularly if the funding comes from a private commercial litigation funder. They set out various obligations on funders and funded parties, including detailed formalities for the content of any litigation funding agreement.
- In 2020, the Courts launched their Pro Bono Scheme,[9] which enables people with limited or no financial means to receive, for free, legal assistance for disputes falling within the Courts' jurisdiction.

C. EVOLVING JURISDICTION

The ADGM Courts (along with the rest of the ADGM) were created by Abu Dhabi Law No. 4/2013 which also originally enshrined their jurisdiction. Abu Dhabi Law No. 12/2020 (the "**Amended Founding Law**") clarified the Court's jurisdiction in a number of ways at Article 13. The CFI has exclusive jurisdiction over disputes on the following bases:

- Civil or commercial claims and disputes involving the ADGM or any of its authorities or any of its establishments, meaning entities incorporated or registered in the ADGM (so-called "party jurisdiction").

1. https://www.adgm.com/documents/courts/legislation-and-procedures/court-procedure-rules/adgm-court-procedure-rules-2016-01092021.pdf.
2. https://www.adgm.com/adgm-courts/legislation-and-procedures.
3. https://www.adgm.com/documents/courts/legislation-and-procedures/legislation/regulations/adgm_courts_regulations_2015_amended_18_december_2018.pdf.
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5. https://www.adgmac.com/arbitration/adgm-a-preferred-global-seat-of-arbitration/.
6. https://www.adgmac.com/.
7. https://www.adgmac.com/panel-of-mediators/.
8. https://www.adgm.com/media/announcements/abu-dhabi-global-market-courts-issue-litigation-funding-rules.
9. https://www.adgm.com/adgm-courts/pro-bono-scheme.

- Civil or commercial claims and disputes arising out of or relating to a contract entered into, executed or performed in whole or in part in the ADGM, or a transaction entered into or performed in whole or in part in the ADGM, or to an incident that occurred in whole or in part in the ADGM ("subject matter jurisdiction").
- Its "legal jurisdiction" covering:
  - any appeal against a decision or a procedure issued by any of the ADGM's authorities according to ADGM law;
  - any request, claim or dispute which the ADGM Courts have the jurisdiction to consider under ADGM law;
  - any issues as to the interpretation of any articles of ADGM law (this amended the original position whereby the ADGM Court of Appeal retained exclusive jurisdiction on this matter).

Parties with no connection to the ADGM can agree in writing, either before or after a dispute has arisen, to have their civil or commercial claims or disputes determined by ADGM Courts, or by way of arbitration seated in ADGM.

The Amending Founding Law also confirmed that the ADGM is an "opt in" jurisdiction: parties with no connection to the ADGM can agree in writing, either before or after a dispute has arisen, to have their civil or commercial claims or disputes determined by ADGM Courts, or by way of arbitration seated in ADGM.

The ADGM Court of Appeal has exclusive jurisdiction to consider and decide on appeals made against the judgments or orders issued by the CFI.

Matters specific to enforcement are considered below, but the Guide to Amendments to Article 13 of Abu Dhabi Law No. 4/2013 (the "**Guidance Note**") has made clear that, in contrast to the DIFC Courts,[10] the ADGM Courts cannot be used as a "conduit route" for the enforcement of judgments and orders that originated outside the emirate and awards made outside ADGM if there are no assets to enforce against within the free zone. Although such judgments can be recognised, parties cannot use the ADGM for the enforcement of non-ADGM judgments and awards in other jurisdictions unless the originating judgment comes from another court within the emirate because "*[a]s a matter of principle, it has always been ADGM Courts' position that parties should go to the place where the relevant assets are located for the purpose of enforcement*" (para. 12, Guidance Note). If parties wish to "*take advantage of the favourable enforcement framework that ADGM Courts have in place with other jurisdictions*", they should make their original dispute subject to litigation or arbitration within the ADGM. This conclusively closes a door left open by the Court in *A4 v. B4* [2019] ADGMCFI 008 (8 October 2019, Justice Sir Andrew Smith), discussed below.

D. INCREASING CONNECTIVITY

I. Domestic Enforcement

Part 6, chapter 10 of the ADGM Courts Regulations 2015 sets out the Courts' rules for the domestic and international enforcement of judgments, decisions and orders into and out of the ADGM. Excluding the DIFC and ADGM, the UAE is a Federal system of seven Emirates, each of whom has their own Court of First Instance and Court of Appeal (the "**UAE Courts**"). Three emirates—Abu Dhabi, Dubai and Ras Al Khaimah—have their own Courts of Cassation too; in the other Emirates, appeals lie directly to the Union Supreme Court (the so-called "Federal Courts system").[11] For the reciprocal enforcement of judgments, decisions and orders and ratified arbitral awards by the UAE and ADGM Courts, the ADGM has built a nexus of memoranda of understanding between the different jurisdictions. Once an executory formula or enforcement letter is attached to a judgment by the sending jurisdiction, the receiving jurisdiction shall enforce that judgment without re-examining the merits of the judgment.

II. International Enforcement

Enforcement may take place into and out of the ADGM under any applicable treaty to which the UAE is a party.

Matters are more complicated for enforcement into and out of the ADGM when the sending or receiving jurisdiction is outside the UAE. Enforcement may take place into and out of the ADGM under any applicable treaty to which the UAE is a party, such as the 1983 Riyadh-Arab Agreement for Judicial Co-operation (the "**Riyadh Convention**") and the 1996 Gulf Co-operation Council Convention for the Execution of Judgments, Delegations and Judicial Notifications (the "**GCC Convention**").

Sections 171 to 173 of the ADGM Courts Regulations 2015 set out the process for the enforcement into the ADGM of judgments from courts other than under an applicable treaty. The Chief Justice may, if "*satisfied that substantial reciprocity of treatment will be assured as regards the recognition and enforcement in [a]foreign country of the judgments of the ADGM Courts*", order that the courts of that foreign country become "*recognised foreign courts*" whose money judgments (but not judgments for the payment of taxes, fines or other penalties) may be recognised and enforced by the ADGM Courts.

There are a number of qualifications, however: the judgment of the recognised foreign court to be registered in the ADGM must be final and conclusive between the parties (even if an appeal is pending against it) and must be given after the coming into force of the Chief Justice's order which recognised the foreign court. A judgment of a recognised foreign court will not be registered if it is given by that court on appeal from a court which is not a recognised foreign court; regarded for the purposes of its enforcement as a judgment of the recognised foreign court but which was given or made in another country; or given by the recognised foreign court in proceedings founded on a judgment of a court in another country and having as their object the enforcement of that judgment.

10. *DNB Bank ASA v. (1) Gulf Eyadah Corporation (2) Gulf Navigation Holdings Pjsc* [2015] DIFC CA 007 (25 February 2016), https://www.difccourts.ae/rules-decisions/judgments-orders/court-appeal/dnb-bank-asa-v-1-gulf-eyadah-corporation-2-gulf-navigation-holdings-pjsc-2015-difc-ca-007.

11. *See* Memorandum of Understanding Between the Ministry of Justice and the Abu Dhabi Global Markets Courts Concerning the Reciprocal Enforcement of Judgments, https://www.adgm.com/documents/courts/memorandum-of-understanding/united-arab-emirates/mou-with-ministry-of-justice-concerning-the-reciprocal-enforcement-of-judgments-signed-4-nov-2019.pdf.

Since 2017, the Chief Justice has recognised a number of foreign courts for the purposes of enforcement, with accompanying memorandums of guidance.

Since 2017, the Chief Justice has recognised a number of foreign courts[12] for the purposes of enforcement, with accompanying memorandums of guidance, including the English Commercial Court, the Singaporean Supreme Courts, the Federal Court of Australia, the Supreme Court of New South Wales, and the Hong Kong High Court.

The process for recognition and enforcement of recognised foreign courts in the ADGM are set out in the ADGM Court Procedure Rules, the ADGM Courts Regulations 2015, and the various memorandums of guidance entered into with the specific foreign courts listed above.

2

The ADGM Courts' Expanding Diet of Cases

The Courts publish a searchable list of claims[13] before them: the first claims were registered at the Courts in 2017, and the numbers of cases show a swift increase over the intervening five years from 7 claims in 2017, 13 in 2018, 8 in 2019, 53 in 2020 and to well over 100 in 2021. An early indication is that the Courts are highly likely to surpass the 2021 total in 2022.

Many, if not most, of the cases registered before the Courts relate to claims by banks against customers in breach of financing contracts, particularly credit card debts, and also to landlord-tenant disputes. None of these decisions have been reported.

A. EMPLOYMENT

The ADGM has its own Employment Regulations 2019 (amending the earlier 2015 Regulations), which set out a comprehensive employment regime. Most employment claims fall within the jurisdiction of the Employment Division that caters for relatively low-value disputes. There have been several reported employment claims in the CFI, including:

- *Karin Berardo v. Stumpf Energy Limited* [2018] ADGMCFI 1 (1 May 2018, Justice Sir Michael Burton):[14] parallel criminal and civil proceedings led to an adjournment of the latter (the case was then disposed of before trial).
- *Tetyana Glukhora v. Espoir Flower Boutique Limited* [2019] ADGMCFI 0001 (25 February 2019)[15] and [2019] ADGMCFI 0002 (14 March 2019, costs; both Justice Sir Michael Burton): a poorly pleaded claim for wrongful dismissal was largely struck out, with costs awarded to the defendant employer.
- *Erik Rubingh v. Veloqx RSC Limited* [2020] ADGMCFI 0005 (13 July 2020) and [2020] ADGMCFI 0006 (29 July 2020; costs); *Alvaro Garcia Torres v. Veloqx RSC Limited* [2020] ADGMCFI 0007 (21 September 2020; all, Justice Sir Michael Burton):[16] successful summary judgments against a family office branch by two former employees. In *Rubingh v. Velocqx RSC Limited* [2020] ADGMCFI 0005 (13 July 2020),[17] the Court awarded over USD 1 million in damages after considering inter alia the status of pre-contractual negotiations, the claimant's failure to plead the existence of a contract relied on in his claim, whether an enticement promised to the claimant was discretionary or not, and the proper construction of terms of the employment contract.
- *Samer Yasser Hilal v. Haircare Ltd* [2022] ADGMCFI 0001 (7 January 2022, Justice Sir Michael Burton):[18] the Court awarded nearly AED 150,000 for wrongful termination of a fixed-term contract, accounting for the employee's entitlements for damages for failures to pay his salary, commission, money in lieu of annual leave, repatriation flight costs, end-of-service gratuity, medical insurance and wrongly deducted visa costs. There was no justification for the claimant's dismissal on the alleged grounds of gross misconduct.

B. REAL PROPERTY

In Rosewood Hotel Abu Dhabi LLC v. Skelmore Hospitality Group Limited, the CFI handed down its first decision in a dispute over an alleged breach of contract and made several case management decisions that showed the Court was unafraid to forge its own path in the interpretation and application of its rules.

Some of the largest disputes before the Courts to date have involved real property located within the ADGM. In *Rosewood Hotel Abu Dhabi LLC v. Skelmore Hospitality Group Limited*, the CFI handed down its first decision in a dispute over an alleged breach of contract and made several case management decisions that showed the Court was unafraid to forge its own path in the interpretation and application of its rules.

In the claim, the claimant alleged that the defendant had failed to pay sums of money said to be due and owing to the claimant under the terms of a lease of commercial premises at the Rosewood Hotel

12. *See* https://www.adgm.com/adgm-courts/memoranda-of-understanding for a list of and links to memoranda of understanding.

13. https://www.adgm.com/adgm-courts/cases.

14. https://www.adgm.com/documents/courts/judgments/adgmcfi-2017-004-judgment-on-application-for-stay-and-costs-of-justice-sir-michael-burton-20042018.pdf.

15. https://www.adgm.com/documents/courts/judgments/adgmcfi-2018-011-judgment-of-justice-sir-michael-burton-25022019.pdf.

16. https://www.adgm.com/documents/courts/judgments/adgmcfi2020014alvaro-garcia-torres-v-veloqx-rsc-limitedjudgment-of-justice-sir-michael-burton-gbe-22.pdf.

17. https://www.adgm.com/documents/courts/judgments/adgmcfi2020005-erik-rubingh-v-veloqx-rsc-limited-judgment-of-justice-sir-michael-burton-gbe-11072020.pdf.

18. https://www.adgm.com/documents/courts/judgments/2022-jan/adgmcfi2021021--samer-yasser-hilal-v-haircare-ltd--judgment-of-justice-sir-michael-burton-gbe-070120.pdf

on Al Maryah Island, the location of the ADGM. The claim comprised six separate heads of claim, with the total amount claimed estimated to be around USD 1.362 million in damages for breach of contract, plus contractual interest and costs. The defendant disputed liability to pay any sum, putting the claimant to strict proof of its claims and arguing a lack of contractual consideration and waiver, denying the claim for liquidated damages as a genuine pre-estimate of loss, and pleading an alleged failure by the claimant to mitigate its loss.

In his decision on 27 May 2019,[19] Justice William Stone declined the defendant's application to join a third party defendant to the proceedings on the basis that the third party had conducted the contractual negotiations between the claimant and the defendant on the claimant's behalf.

The defendant sought permission to appeal this decision to the Court of Appeal, consisting of the Chief Justice, Lord David Hope, His Honour Justice Sir Peter Blanchard and His Honour Justice Kenneth Hayne, who dismissed the application on 1 September 2019.[20] In its reasoning, the Court of Appeal considered that Rule 56 of the ADGM CPR differed from Rule 19.5 of the English Civil Procedure Rules (and also rule 20.28 of the Rules of the DIFC Courts) in that there was no requirement for the addition of a party to be "*necessary*" and demonstrating that the Courts would, as justice dictated, shape its own procedural rules.

After striking out parts of the witness evidence made in support of the defendant's case,[21] the Court found at trial in the claimant's favour and awarded it over USD 1.6 million for outstanding debts.[22] The defendant failed to attend trial, having changed legal representation the night before it was due to begin and after unsuccessfully applying to adjourn the hearing.

The claimant as judgment creditor applied to the Courts for an order under Rule 253 of the ADGM CPR 2016 compelling a director of the defendant as judgment debtor to attend Court to provide information about the defendant's means and for the purposes of enforcing the substantive judgment. On 6 February 2020,[23] Justice Stone considered the territoriality of the Courts' power to make an order under Rule 253 in face of the defendant's objection that the Court had no extra-territorial power to grant the application, as the Court was not permitted to order the attendance of a director of a judgment debtor company who was outside the jurisdiction of the ADGM (the judgment debtor company was registered in the DIFC, the summonsed director resided in Dubai and was not present in the ADGM when the Rule 253 application against him was made). The defendant relied on the decision of the House of Lords in *Masri v. Consolidated Contractors International Co SAL and others* [2009] UKHL 43, where Lord Mance had made statements about the analogous English provision (Part 71 CPR), concluding that the CPR "*does not contemplate an application and order in relation to an officer outside the jurisdiction*" (quoted at para. 12).

The judge rejected the judgment debtor's contentions: the summonsed director was its "*directing mind*" and could:

> *"credibly…be regarded as the Defendant's alter ego, such that he can be assimilated to the judgment debtor for the purposes of an order under Rule 253, and thus (as was recognised in Masri) that in such circumstances an order may be made against him as if it were made against the judgment debtor itself"* (para. 20).

Nothing in Rule 253 could be construed as restricting its ambit to only directors within the ADGM when its true reach was across the UAE and when (unlike in *Masri*) a director in the ADGM would otherwise only need to drive out of the free zone to escape its jurisdiction, an extremely likely situation given the very limited numbers of people ordinarily resident there.

There have been four judgments of the ADGM Court of Appeal as of February 2022, all of which have been in the *Rosewood* litigation. A renewed application for permission to appeal to the Court of Appeal, following the judge's refusal to grant permission to appeal his 27 May 2019 decision on the joinder of a third party, also failed, with the applicant narrowly avoiding an award of indemnity costs against it.[24] The costs of the permission application were assessed on 26 January 2020.[25] The judgment debtor then failed to persuade the Court of Appeal that the trial judge was wrong not to adjourn the trial,[26] awarding costs to the respondent.[27]

An interim third party debt order was made over a restaurant in the ADGM, which was a sister company to the judgment debtor in the same group of companies but, upon further enquiry into the nature of the debt allegedly owed, the Court discharged the interim order and refused to make a final third party debt order.[28]

C. COMMERCIAL DISPUTES

The CFI has made several judgments in straightforward commercial matters which have given rise to some interesting decisions on procedural and enforcement issues.

The CFI has made several judgments in straightforward commercial matters which have given rise to some interesting decisions on procedural and enforcement issues.

In *AEFO Technical Services LLC v. Aquarius Global Limited* [2021] ADGMCFI 0003 (7 April 2021, Justice William Stone),[29] the defendant had paid less than half of a AED 21 million interim payment order made against it. The Court declined to make a penalty order (consisting of a referral to the Attorney General of Abu Dhabi or a fine of USD 10,000 plus costs) against the defendant's sole director by way of contempt of court. The judge, after surveying the changing landscape for contempt in England, concluded that the English position was "*difficult [to] accept*", as it drew a distinction between breach of an order for the payment (into court) of money by way of

19. [2019] ADGMCFI 0003.

20. [2019] ADGMCFI 0005.

21. *Rosewood Hotel Abu Dhabi LLC v. Skelmore Hospitality Group Ltd.* [2019] ADGMCFI 0008 (4 November 2019), https://www.adgm.com/documents/courts/judgments/2019-adgmcfi-0008-adgmcfi-2019-003--judgment-of-justice-stone-sbs-qc-041119.pdf.

22. [2019] ADGMCFI 0009, https://www.adgm.com/documents/courts/judgments/adgmcfi-2019-003-judgment-of-justice-stone-sbs-qc-16122019.pdf.

23. [2020] ADGMCFI 0003, https://www.adgm.com/documents/courts/judgments/adgmcfi-2019-003-rosewood-hotel-v-skelmore-judgment-of-justice-stone-20200206-final.pdf.

24. [2019] ADGMCA 0001 (1 September 2019), https://www.adgm.com/documents/courts/judgments/adgmcaapp20190001skelmore-hospitality-group-ltd-v-rosewood-hotel-abu-dhabi-llc--judgment.pdf.

25. [2020] ADGMCA 0001 (26 January 2020), https://www.adgm.com/documents/courts/judgments/adgmca-app-2019-001-skelmore-hospitality-group-ltd-v-rosewood-hotel-abu-dhabi-llc-judgment-26012020.pdf.

26. [2020] ADGMCA 0002 (12 February 2020), https://www.adgm.com/documents/courts/judgments/adgmca-app-2019-002--skelmore-hospitality-group-ltd-v-rosewood-hotel-abu-dhabi-llc-judgment-20200212.pdf$.

27. [2020] ADGMCA 0003 (31 March 2020), https://www.adgm.com/documents/courts/judgments/adgmcaapp2019002--skelmore-hospitality-group-ltd-v-rosewood-hotel-abu-dhabi-llc--judgment-final-3103.pdf.

28. [2020] ADGMCFI 0004 (4 June 2020), https://www.adgm.com/documents/courts/judgments/20200604-adgmcfi2019003--judgment-of-justice-stone-sbs-qc-final-third-party-debt-order-final.pdf.

29. https://www.adgm.com/documents/courts/judgments/07042021-adgmcfi-2020-026-aefo-v-aquarius-global-limited-judgment-of-justice-stone-sbs-qc.pdf.

security, which was capable of attracting a contempt order, and breach of an order of payment of money direct to another party, which was not so capable. The judge considered rejecting this *"dichotomy, and on this basis alone would have been minded to reject the present application as being unjustified as a matter of principle"* (para. 28). However, he accepted that this was the English position and stressed that "*on the assumed basis that a like view should prevail in the ADGM courts"* (para. 29), proceeded to find that the exercise of his discretion mitigated against an order for contempt being made. First, an unless order made by the Court, which resulted in the striking out of the defence, was enough sanction for the non-payment, and the non-payment was not in itself serious enough to warrant additional punishment: it did not amount to the "*type of contumelious conduct associated with the sanction of contempt*". Second, the failure to pay into court was not "*unequivocal conduct*", i.e., conduct that appeared to be deliberate and wilful by the defendant, but was rather because the defendant simply did not yet have the funds. The criminal burden of proof applied to application, which the claimant had not satisfied. Finally, the relevant order to pay did not contain a penal notice, which it was "*generally accepted*" was necessary as a matter of practice.

In *Abu Dhabi Commercial Bank PJSC v. KBBOBRS Investments Holdings Limited & Anor* [2021] ADGMCFI 0002 (28 March 2021, Justice William Stone),[30] the CFI granted the claimant lender an order for possession and sale of a commercial property within the ADGM, which was subject to a registered mortgage between the claimant and the defendants, one of which was owned by Dr B R Shetty, and the order for possession and sale was part of the enforcement against security for a loan made to Dr Shetty and another (who owned the first defendant) under a shariah-compliant Murabaha agreement, a type of Islamic financing structure. The dispute took place against the backdrop of the collapse of the NMC group of companies (see below). The claimant had a contractual right under mortgage to sell the property in the event of a default under the Murabaha, with an additional right to apply to the ADGM Courts for "*permission or authority to do so"*; it accordingly brought proceedings. The Court found it had legal jurisdiction to order the sale under Rule 184 of the ADGM CPR amongst other provisions. Questions arose about the lender's rights to market and sell the property, for which it had instructed a well-known property company.

Firstly, there was an issue between the parties as to the minimum sale price that the Court should order, and the first defendant contended that there were "*real concerns*" of the property being sold at an undervalue (para. 32). The Court was mildly critical that the claim had been brought under Rule 30 of the ADGM CPR, the equivalent of a proceeding under Part 8 of the English CPR and which did not anticipate a "*substantial dispute of fact*", and no directions had been sought for the adducing of expert evidence by either side which may have helped to ascertain the minimum sale price. Although evidence from valuers had been put before the Court, its "*content, on the present state of play, [could not] properly be tested"* (para. 35). The Court was reluctant to err on the side of caution and agree with the first defendant's lower valuation (which, along with all the valuations and the minimum sale price itself, was not placed in the public domain in advance of the marketing process), noting the receding of the COVID-19 pandemic and a predicted general improvement in the particular economy of the ADGM was likely.

Second, there was an issue on whether the claimant should have permission itself to bid for the property. The first defendant opposed this: the bank had a duty to obtain the best price reasonably obtainable and to act fairly towards the borrower; if the bank were permitted to bid, it risked undermining these duties and creating a conflict between the wish to secure the best deal for itself and the obligation to secure the best deal for the borrower. The Court permitted the bank to bid for the property on the basis that no sale to it be concluded without approval of the Court.

2021 saw the determination of the Court's biggest value claim to date in fully-opposed proceedings, in *Global Private Investments RSC Limited v. Global Aerospace Underwriting Managers Limited and others* [2021] ADGMCFI 0008 (5 December 2021, Justice Sir Andrew Smith),[31] a claim for over USD 52.5 million by the owner of a Gulfstream jet against its insurers for an indemnity and other compensation arising from severe damage suffered by the jet in a hailstorm. Earlier in the litigation, the ADGM Court made its first order for security for costs (2 May 2021, Justice Sir Andrew Smith), directing the claimant to pay USD 650,000 by way of security. After a three-day hearing in November, Justice Sir Andrew Smith found the proper construction of the insurance policy (which was governed by ADGM law) in the insurers' favour. The parties have been granted permission to appeal and to cross-appeal respectively.

D. COMPANY AND INSOLVENCY

In the very first reported judgment of the Court, *Afkar Capital Limited v. Saifallah Fifkry* [2017] ADGMCFI 1 (26 November 2017, Justice Sir Andrew Smith),[32] it declined to make a number of declarations on an interim basis relating to the convening of a board meeting, various appointments and resolutions alleged by the claimant company to have been made at the meeting (including the removal of the defendant as senior executive officer), and the status of the minutes of the meeting as evidence of the proceeding.

There have been a number of insolvency matters[33] in the Courts, including *Mohammed Al Dahbashi Advocates & Legal Consultants v. Gilligan Holdings Limited* [2020] ADGMCFI 007 and the matters of *Veloqx RSC Limited* [2021] ADGMCFI 022), *Dominion Fiduciary Services (Middle East) Limited* [2021] ADGMCFI 039 and *Elia Investments Limited* [2021] ADGMCFI 040.

The NMC Litigation

> *Unquestionably the best-known and most important case before the ADGM Courts so far has been as the superintending Court in the administration of the NMC group of companies (NMC), in which matter the CFI has rendered a number of decisions.*

Unquestionably the best-known and most important case before the ADGM Courts so far has been as the superintending Court in the administration of the NMC group of companies (**NMC**), in which matter the CFI has rendered a number of decisions. NMC was and

30. https://www.adgm.com/documents/courts/judgments/28032021-adgmcfi2020019--adcb-v-kbbobrs-investments-holdings-limited--anor--judgment.pdf.

31. https://www.adgm.com/documents/courts/judgments/2021-dec/adgmcfi2020051--judgment-construction-of-policy-intention-to-sell-05122021-sealed.pdf.

32. https://www.adgm.com/documents/courts/judgments/adgmcfi-2017-003-judgment-afkar-capital-limited-v-fikry-26112017.pdf.

33. *See* https://www.adgm.com/adgm-courts/cases?courtType=appeal.

remains the largest provider of private healthcare in the UAE, operating more than 200 hospitals and medical facilities. Its CEO and founder, Dr Shetty, was widely feted in the Gulf as a pioneer of medical systems. By 2020, NMC had incurred very large debts of between USD 4.3 and 5.3 billion which, fraudulently, had not been disclosed in its financial statements. In April 2020, NMC's listed parent company was put into administration by the English High Court.

By order dated 27 September 2020,[34] (and amended on 6 October), the CFI appointed administrators over 36 NMC companies. Justice Sir Andrew Smith noted that the ADGM's insolvency regime was "*in my ways, similar to the English regime*" but with certain differences (e.g., the English regime does not include an equivalent to the priority funding provisions found in section 109A of the Insolvency Regulations 2015). The 36 NMC entities had originally been limited liability companies registered in the Emirates of Abu Dhabi, Sharjah and Dubai, and had no connection to the ADGM. However, the administrators (whose powers to act on behalf of the companies' were confirmed on 10 March 2021)[35] took the companies out of the "mainland" UAE legal framework and into the ADGM for the administration: they successfully applied to the ADGM Companies Registrar to register the companies in the ADGM with the consent of the management, owners and creditors of the companies. This re-domiciling of the companies into the ADGM allowed them to access its insolvency regime. The ADGM Courts were viewed as providing access to expert lawyers familiar with administrations, a new concept and one without a direct analogue under UAE civil law, and any judgment, order or decision of the ADGM Courts was viewed as more easily enforceable outside the UAE than one rendered by the Emirati or Federal courts. This strategy proved ultimately successful: by early 2022, NMC was reporting positive financial results and parts of the group had left administration and had been handed over to new owners.

E. ARBITRATION AND THE ADGM COURTS

The Arbitration Regulations 2015 were initially speculated as requiring a connection between the underlying dispute and the ADGM, but neither the Courts nor ADGM law have ever required a factual matrix between a dispute in arbitration and the ADGM, as a contractual 'opt-in' is sufficient.

There have been a limited number of reported Court judgments focusing on arbitration. Decisions in two early arbitration cases, *A1 v. B1* (9 January 2018) and *A2 v. B2* (11 October 2018), are no longer publicly available, although it is known that one of these cases involved a pre-claim,[36] *ex parte* application for interim relief.

In *A3 v. B3* [2019] ADGMCFI 0004 (4 July 2019, Justice Sir Andrew Smith),[37] the Court found that there was a valid and binding arbitration agreement (although in unusual terms) between the parties that disputes arising under a lease between them would be subject to arbitration under ICC Rules with the arbitration seated in the ADGM. The parties had agreed to subject any dispute to arbitration under the rules of the Abu Dhabi Commercial Conciliation and Arbitration Centre (**ADCCAC**) but further agreed that, if the ADGM should establish an arbitration centre in advance of any relevant proceedings, the claimant "*may notify*" the respondent that the arbitration would be under the rules of the new arbitration centre instead, and that the respondent was obliged to "*sign such documentation as may reasonably be required…to give effect to such alternative*". The ICC representative office was established after the agreement was formed, the claimant duly gave notice and sought to bring an arbitration under the ICC Rules, which the ICC Court declined to allow to proceed, prompting the application to the ADGM Courts.

In *A4 v. B4* [2019] ADGMCFI 008 (8 October 2019, Justice Sir Andrew Smith),[38] the CFI considered an opposed application for the recognition and enforcement of a foreign arbitral award issued in an arbitration seated in England under the LCIA Arbitration Rules. The Court confirmed, first, that it had jurisdiction to recognize and order enforcement of the award: the Arbitration Regulations permit the recognition and enforcement of awards made under the New York Convention, which included the foreign arbitral award. As none of the grounds under the Arbitration Regulations for refusing recognition or enforcement were satisfied, the Court was required to enforce the foreign award. Second, while it was open to a respondent to challenge recognition and enforcement on the ground that the foreign award was based on an invalid arbitration agreement, the respondent did not raise that objection in this case.

In *A4 v. B4* [2019] ADGMCFI 0007[39] the Court also rejected a hypothetical challenge that enforcement of the foreign award would be contrary to UAE public policy on the basis that the respondent and the applicant were incorporated in Abu Dhabi, outside the ADGM. The judge noted the risk that the applicant was seeking to enforce the foreign award without the respondent having assets in the ADGM but concluded that this question did not fall for determination: the burden of proof lay on the respondent, who made no submissions on this point. Although the Court acknowledged it had the jurisdiction to rule on an illegality or other public policy issue on its own initiative, there was no factual basis to do so in this case. There was no evidence that the respondent did not have, or would not have, assets within the ADGM at present or in the near future and so no reason to suppose that the applicant sought recognition and enforcement in these proceedings simply as a conduit to execute against assets elsewhere in the UAE. There was also no evidence that there might be duplication between the proceedings in the ADGM and other courts of the UAE. The respondent had not brought proceedings to challenge the foreign award and there was no evidence that it intended to do so. There was also no evidence that the applicant had brought proceedings in other courts of the UAE, and there was no evidence that it intended to do so. Crucially, the Court considered that even if the applicant were to initiate similar proceedings before other courts of the UAE, the Court felt that it would not, in itself, be objectionable or contrary to the public policy of the UAE to have parallel enforcement proceedings in different jurisdictions of the UAE. The Court also added that the Respondent would not suffer any unfairness or any detriment as a result of the Award being recognised and enforced by order of the Court rather than, or in addition to, by order of another court of the UAE. The Court thus concluded that there was no reason to refuse recognition and enforcement of the Award on the grounds of the public policy of the UAE.

34. [2020] ADGMCFI 0008, https://www.adgm.com/documents/courts/judgments/adgmcfi-2020-020---nmc-healthcare-ltd---judgment-of-justice-sir-andrew-smith-amended-06102020.pdf.

35. [2021] ADGMCFI 0001, https://www.adgm.com/documents/courts/judgments/adgmcfi-2020-020---nmc-healthcare-ltd---judgment-of-justice-sir-andrew-smith-10032021-final.pdf.

36. http://arbitrationblog.kluwerarbitration.com/2019/03/12/abu-dhabi-global-market-courts-enhances-its-attractiveness-as-an-arbitral-seat/.

37. https://www.adgm.com/documents/courts/judgments/2019-adgmcfi-0004--adgmcfi2019007--a3-v-b3--judgment-of-justice-sir-andrew-smith--04072019--redacted.pdf.

38. https://www.adgm.com/documents/courts/judgments/2019-adgmcfi-0007--adgmcfi2019008--a4-v-b4--judgment-of-justice-sir-andrew-smith--171019--redacted-v.pdf.

39. https://www.adgm.com/documents/courts/judgments/2019-adgmcfi-0007--adgmcfi2019008--a4-v-b4--judgment-of-justice-sir-andrew-smith--171019--redacted-v.pdf.

Finally, in *A5 v. (1) B5 (2)* C5 [2021] ADGMCFI 0007 (19 September 2021, Sir Andrew Smith),[40] the Court upheld an application for the recognition of an arbitral award despite a challenge by the award debtors, who had failed to apply within time to set aside the award and who lacked any grounds for refusing recognition.

F. DUBAI ISLAMIC BANK AND THE INTERPLAY BETWEEN LITIGATION AND ARBITRATION

Not all of NMC's creditors were happy with the ADGM Courts' management of the administration. In 2021, Dubai Islamic Bank sought to stay proceedings in the CFI by the joint administrators and the companies in administration. The bank argued that arbitration agreements in two Master Murabaha Agreements, under which it had loaned monies to NMC, should prevail and that specific court proceedings should be stayed in accordance with section 16 of the Arbitration Regulations 2015 which gives priority to arbitration and obliges a stay in any court proceedings whose subject is covered by the arbitration agreement unless satisfied the agreement is "*null and void, inoperative, or incapable of being performed*".

In a judgment dated 24 May 2021,[41] Justice Smith acknowledged that the "*starting point for interpreting an arbitration agreement and determining its scope*" was "*not to focus on 'fussy distinctions*'" about the exact terms used, but to construe it liberally, recognising that "*generally rational businessmen entering into an arbitration agreement will intend that any dispute arising out of their relationship should be resolved by the same tribunal*": *Fiona Trust & Holding Corp v. Privalov* [2007] UKHL 40, [13], [26] and [27]. The judge noted that, in England, insolvency does not prevent a matter from being arbitrated even though the tribunal may not be able to make all the necessary orders, whereas Singaporean law construes an arbitration agreement as excluding insolvency disputes entirely. He concluded that the ADGM Courts will follow the approach of English law in accordance with the Application of English Law Regulations 2015 (para. 82). However, although the Arbitration Regulations 2015 differed from the English Arbitration Act 1996, which expressly preserved the operation of any rule of law on matters incapable of settlement by arbitration (s. 81(1)), the judge considered recent English authorities supporting narrow rather than wide rules on non-arbitrability, and concluded that the bank was entitled to have part of its claim determined in arbitration and stayed the CFI proceedings to the extent necessary to give effect to that right.

G. COSTS

The ADGM Courts have comparatively fewer rules (at Part 24 of the ADGM CPR and Practice Direction 9) about the assessment of costs than contained in the English CPR, leaving decisions more open to the Court's discretion. As well as the cases noted above, in *Afkar Capital Limited v. Saifallah Fikry* [2018] ADGMCFI 2 (2 May 2018, Justice Sir Andrew Smith),[42] the CFI noted how the framework of ADGM rules on costs reflected English law (paras. 46 and 63). The Court carried out a detailed analysis of costs principles and submissions *inter alia* covering the costs sought by the successful claimant after trial in *Rosewood Hotel Abu Dhabi LLC v. Skelmore Hospitality Group Ltd* [2020] ADGMCFI 0003 (16 March 2020, Justice William Stone).[43] More typical of the Courts' orders is that of Justice Sir Michael Burton in *Tetyana Glukhora v. Espoir Flower Boutique Limited* [2019] ADGMCFI 0002 (14 March 2019).[44] In *A3 v. B3* [2019] ADGMCFI 0006 (25 August 2019, Justice Sir Andrew Smith)[45] the Court again made reference to the English CPR and refused to award costs on an indemnity basis.

2

Conclusion: Where Will the Next Five Years Take the ADGM Courts?

While no one can predict precisely what market conditions and legal challenges will exist in the future, it seems likely that the following trends will contribute to shape the growth of the ADGM and its Courts in the near term:

There is likely to be a growing number of complex, cross-border disputes as the ADGM continues to grow as a preferred place for company incorporation.

- There is likely to be **a growing number of complex, cross-border disputes** as the ADGM continues to grow as a preferred place for company incorporation, from local firms to special purpose vehicles and large offices for multi-nationals, many (if not most) of whom are likely not to opt out of the ADGM Courts' jurisdiction. The ADGM already hosts many professional and financial services companies. A particular industry of growth may be financial technology, or 'fintech'. The ADGM has an active fintech regulatory 'sandbox' that has attracted, and will continue to attract, digital asset companies, including those who trade in cryptocurrencies like Bitcoin. It is highly likely that the ADGM Courts will manage more disputes relating to financial technologies given the drive to attract such companies to the ADGM. If the Courts were to develop a particular expertise in technology disputes, it is conceivable that fintech companies based outside the ADGM may make greater use of the Courts' opt-in jurisdiction.
- The ADGM Courts will become only **more connected to the international legal order**, with more Chief Justice's directions recognizing foreign courts for the purposes of enforcement and more memorandums of guidance or understanding that

40. https://www.adgm.com/documents/courts/judgments/2021-sep/adgmcfi-2021-057---a5-v-b5---judgment-19092021.pdf.

41. [2021] ADGMCFI 0006 (24 May 2021), https://www.adgm.com/documents/courts/judgments/2021-may/adgmcfi2020020-and-adgmcfi2021042--nmch--dib-pjsc--judgment-of-justice-sir-andrew-smith-final-240520.pdf.

42. https://www.adgm.com/documents/courts/judgments/adgmcfi-2017-003-judgment-afkar-capital-limited-v-saifallah-fikry-justice-sir-andrew-smith-02052018.pdf.

43. https://www.adgm.com/documents/courts/judgments/20200316-adgmcfi-2019003--judgment-of-justice-stone-sbs-qc-costs-final.pdf.

44. https://www.adgm.com/documents/courts/judgments/2019-adgmcfi-0002-adgmcfi-2018-011---judgment-of-justice-sir-michael-burton-14032019.pdf.

45. https://www.adgm.com/documents/courts/judgments/2019-adgmcfi-0006--adgmcfi2019007--a3-v-b3--judgment-of-justice-sir-andrew-smith--redacted--25082019.pdf.

set out and confirm the processes for reciprocal enforcement with these jurisdictions.

- The Courts will continue to play a role in **driving-up employment standards in the ADGM**. The CFI has proven itself to be a robust defender of employment rights, as the Rubingh, Torres and Hilal judgments demonstrate. The advent of the Pro Bono Scheme, the modernization of the Employment Regulations in 2019 to develop anti-discrimination measures amongst others, and the continued work of the Employment Affairs Office[46] which provides guidance, promotes best practice and works with both employers and employees to further employment law in the ADGM.
- The Courts will continue to develop as **a preferred seat of arbitration** and a venue for in-person arbitrations. The published judgments of the Courts in the *A. v. B.* line of decisions are all sensible and robust and demonstrate that the Courts will act in a prudent manner to uphold agreements to arbitrate, make interim orders that support arbitrations, and enforce both domestic and international arbitral awards. It is not inconceivable that the consolidation of arbitral institutions in Dubai that occurred as a result of Dubai Decree No. 34/2021, which folded the DIFC-LCIA and Emirates Maritime Arbitration Centres into the Dubai International Arbitration Centre (DIAC), may spread to Abu Dhabi. If that happens, there is a further likelihood that the ADGM will be promoted as the Emirate of Abu Dhabi's prime seat for arbitrations, similar to how under Dubai Decree No. 34/2021, the DIFC is the default seat for DIAC arbitrations from September 2021.
- There will be a **continued expansion of online dispute resolution at the ADGM**. The ADGM had an early mover's advantage when the COVID-19 pandemic forced a move away from close personal interaction, as it had already invested heavily in first-rate case management software and had developed appropriate protocols for remote hearings. The Courts' Registry is now highly experienced at the technical logistics involved in multi-party hearings with judges, counsel, witnesses and parties scattered across the globe.
- There will be further development of a unique body of ADGM substantive and procedural law that draws on but departs from English law. This is needed to reflect the unique legal structures of the UAE, and is possible because the Courts are, to an extent, able to draw on best practice from around the common law. This shift will be bound by the Application of English Law Regulations, but as the Rosewood dispute demonstrated in the Rule 253 application, principles drawn from English case law and provisions analogous to those in the ADGM may be applied differently by the Courts.

46. https://www.adgm.com/operating-in-adgm/employment-affairs-office.

شهد العام 2021 الذكرى الخامسة لأول النزاعات التي سجلت أمام محاكم سوق أبوظبي العالمي. تنظر هذه المقالة في الجوانب المختلفة لمحاكم سوق أبوظبي العالمي بما فيها الهيكل التنظيمي والولاية القضائية واتصالها بالمحاكم المحلية والدولية الأخرى فيما يتعلق بالتنفيذ. كما تلقي نظرة على أهم قضايا هذه المحاكم خلال سنواتها الخمس الأولى بما في ذلك دعوى الـ NMC والنزاع المرتبط بها المتعلق بمؤسسها د. ب ر شيتي وتتناول أيضا المقالة في التطورات المستقبلية لهذه المحاكم.

BIOGRAPHY

PETER SMITH is a Senior Associate in the Dubai office of Charles Russell Speechlys. He has acted in a number of disputes before the ADGM Courts, including in the winding-up of Veloqx RSC Limited, the security for costs application in Global Private Investments RSC Limited and the application to set aside default judgment in *Laktineh & Co. Ltd. v. (1) Ahmed Al Hatti and (2) Cayan Real Estate and Development LLC*. He was a drafter of the ADGM Pro Bono Scheme Rules and sits on the ADGM Rules Liaison Group.
Peter was recommended as a "Rising Star" in the Legal 500 in both 2020 and 2021 and was "notable" in the Legal 500, 2019 (UAE Dispute Resolution: Arbitration and International Litigation). He has experience of a wide range of civil and commercial disputes and sectors.
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Evaluating Saudi Commercial Courts as a Venue for International Commercial Disputes

The New Commercial Courts Law (CCL) is intended to reshape the commercial judiciary and attract commercial disputes to the realm of Saudi commercial State courts by ensuring the efficient resolution of commercial disputes according to international standards.
An analysis of the main provisions of the CCL clearly reflects the modern litigation features embedded with this new law.
The Saudi commercial courts as reshaped by the CCL present a certain number of characteristics comparable to other existing international commercial courts and similar to arbitration: they are innovative, cost-effective, technologically state of the art. However, the CCL is not without imperfections. In fact, some important provisions have been omitted by the regulator, which may reduce the attractiveness of commer-

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La nouvelle loi sur les tribunaux de commerce (la « CCL ») vise à remodeler le système judiciaire commercial et à attirer les litiges commerciaux dans le champ de compétences des tribunaux commerciaux saoudiens en garantissant la résolution efficace des litiges commerciaux conformément aux normes internationales.
Une analyse des principales dispositions de la CCL reflète clairement les caractéristiques d'un contentieux moderne intégrées à cette nouvelle loi. Les tribunaux de commerce saoudiens tels que remodelés par la CCL présentent un certain nombre de caractéristiques comparables aux autres tribunaux de commerce internationaux existants et similaires à l'arbitrage : ils sont innovants, rentables, à la pointe de la technologie. Cependant, la CCL n'est pas sans imperfection. En effet, certaines

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cial courts, especially in the context of regional and international disputes. It would behove the Saudi regulator to take into account some suggestions to improve the visibility of Saudi commercial courts as a possible forum for the adjudication of cross-border commercial disputes.

dispositions importantes ont été omises par le régulateur, ce qui peut réduire l'attractivité des tribunaux de commerce, notamment dans le cadre de contentieux régionaux et internationaux. Certaines suggestions pourraient être prises en compte par le régulateur saoudien afin d'améliorer la visibilité des tribunaux de commerce saoudiens en tant que forum possible pour le règlement des litiges commerciaux transfrontaliers.

Introduction

The last ten years has witnessed revolutionary legal reforms in the Kingdom of Saudi Arabia. The Wahabist country, which is home of the two Islamic shrines, started to abandon its skepticism of man-made regulations and joined—without compromising their Islamic culture and the role that Sharia plays in its legal system as the supreme and ultimate source of law—the club of Islamic countries that recognize the legitimacy of the regulatory process. Indeed, soon after Mohamed Ben Salman's appointment as the Crown Prince of Saudi Arabia in 2017, the Kingdom witnessed the richest legislative frenzy ever. Regulatory reforms aiming essentially at modernizing the Kingdom and diversifying its economy through promoting foreign investments as part of the 2030 Vision Plan have touched upon several industries. Several new regulations have been enacted, embracing the major economic, social, health and technology changes.[1]

Of utmost importance is the new Commercial Courts Law enacted by virtue of the Royal Decree No. M93/1441,[2] which has been followed by its Implementing Decree[3] (together, the "**CCL**").

The CCL is intended to reshape the commercial judiciary and attract commercial disputes to the realm of Saudi commercial State courts by ensuring the efficient resolution of commercial disputes according to international standards.

At a point of time where the resolution of commercial disputes by way of arbitration is a growing industry for business actors in Saudi Arabia, one may ask whether and to what extent commercial courts as reshaped by the CCL may be considered as a competitor to arbitration for the resolution of commercial disputes.

The new commercial courts as reshaped by the CCL present a certain number of characteristics comparable to other existing international commercial courts.

An analysis of the main provisions of the CCL clearly reflects the modern litigation features embedded in the new regulation. Indeed, as we shall see in further details, the new commercial courts as reshaped by the CCL present a certain number of characteristics comparable to other existing international commercial courts: they are innovative, cost-effective, technologically state of the art, and incorporate desirable characteristics of arbitration by allowing procedural arrangements between the parties. Accordingly, its positive impact on the litigation landscape in Saudi Arabia seems at first sight undisputable, whether in the context of domestic or international disputes.

As bright as the picture may seem to be, it is the author's view that the CCL is not without imperfections. The regulator has omitted some important provisions, which may reduce the attractiveness of the commercial courts, especially in the context of regional and international disputes.

This paper is divided into two parts. Part I analyzes the main provisions contained in the CCL and examines the possible emergence of Saudi commercial courts as a competing forum to arbitration. Part II explores some of the gaps that the CCL has failed to address and that may negatively affect the attractiveness of Saudi commercial courts, particularity in the context of international disputes. Throughout this analysis, the author will provide some suggestions that, if taken into account by the Saudi regulator, may improve the visibility of Saudi commercial courts as a possible forum for the adjudication of cross-border commercial disputes.

1. For instance, without being exhaustive: the new Bankruptcy Law (Royal Decree No. M5/1439 dated 28/05/1439 H, corresponding to 13 February 2018); the new E-commerce Law (Royal Decree No. M126/1440, dated 7/11/1440 H, corresponding to 10 July 2019); a new Competition Law (Royal Decree No. M75/1440, dated 29 June 1440 H, corresponding to 6 March 2019); a new Government Tenders and Procurement Law (Royal Decree No. M128/1440, dated 13/11/1440 H, corresponding to 16 July 2019); and a new Franchise Law (Royal Decree No. M22/1441, dated 9/2/1441 H, corresponding to 8 October 2019).

2. Royal Decree No. M93/1441 dated 15/08/1441 H (corresponding to 8 April 2020) approving Cabinet Decision No. 511/1441.

3. Implementing Decree issued by virtue of the Decision No. 8344/1441 dated 26/10/1441 H (corresponding to 18 June 2020) approving Circular No. V13/8159/1441.

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Saudi Commercial Courts: A Forum Competitive with Arbitration?

In 2012, the Saudi regulator enacted a new Arbitration Law based on international arbitration standards and inspired by the UNCITRAL Model Law.[4] The law was complemented five years later by its Executive Regulation[5] (together, the "**New Arbitration Law**"). The enactment of the Arbitration Law was underpinned by the Saudi regulator's aim to provide investors with a modern framework for an out-of-court resolution of their disputes, because the Saudi court system was poorly equipped to deal with commercial disputes, particularly in terms of judges' qualifications and the time frame for the issuance of the judgments.

In fact, since 2012, many efforts have been made to establish arbitration as the common means for the resolution of commercial disputes in Saudi Arabia. Hence, the Arbitration Law was followed by the enactment of a new Enforcement Law dated March 2013 establishing for the first time in Saudi Arabia specific enforcement courts and providing a more lenient scheme in respect of the recognition and enforcement of foreign arbitral awards.[6] In the same vein, several governmental and non-governmental institutions are participating in what is called a "national campaign" to raise awareness about arbitration in Saudi Arabia. The New Arbitration Law has been considered as giving effect to "arbitration-friendly" principles prevalent in modern arbitration laws around the world and is therefore based on the same dynamics of any modern arbitration law among which the efficiency and flexibility of the procedure.

The CCL has transformed litigation in Saudi commercial courts by consecrating progressive and modern rules, thereby creating similarities between litigation and arbitration in terms of efficiency and flexibility of the procedure

The CCL has transformed litigation in Saudi commercial courts by consecrating progressive and modern rules, thereby creating similarities between litigation and arbitration in terms of efficiency and flexibility of the procedure, two important considerations behind parties' choice of arbitration over litigation.

4. Royal Decree No M34/1433, dated 24/5/1433 H (corresponding to 16 April 2012) approving the Arbitration Law. For a general overview about the Arbitration Law, see Salah Al Hejailan, The New Saudi Arbitration Act: A Comprehensive and Article-by-Article Review, 4(3) Int'l J. Arab Arb. 15 (2012).

5. Implementing Rules of Arbitration Regulations of Saudi Arabia, in effect 9 June 2017 in 4 *ICCA International Handbook on Commercial Arbitration* 1 (ICCA & Kluwer Law International 2020). For a general overview of the Implementing Rules of Arbitration Regulations, see Mohamad Mahayni & Zaid Mahayni, "Saudi Arabia: An Overview of The New Implementing Regulations To The Saudi Arbitration Law", 13 June 2017, https://www.mondaq.com/saudiarabia/arbitration-dispute-resolution/601494/an-overview-of-the-new-implementing-regulations-to-the-saudi-arbitration-law.

6. Royal Decree No. M53/1433 dated 13/8/1433 H (corresponding to 3 July 2012) on the Execution Law.

After making a general overview of the CCL (**A**), this article will explore the main litigation features before Saudi commercial courts as brought by the CCL, and how such features may render Saudi Commercial courts as attractive as arbitration for the resolution of commercial disputes (**B**).

A. GENERAL OVERVIEW OF THE NEW COMMERCIAL COURTS LAW

The CCL is divided into 11 sections. The first section, entitled "General provisions":

- contains some definitions;[7]
- envisages the possibility of collaboration with the private sector in respect of several aspects of the dispute;[8]
- makes it possible for parties to agree on certain aspects of the procedure;[9]
- introduces the concept of e-litigation;[10]
- provides a mandatory two-tier dispute resolution scheme for certain types of disputes by imposing recourse to mediation before submitting a dispute to commercial courts;[11]
- deals with low-scale disputes;[12] and
- introduces (for the first time in Saudi Arabia) the concept of class actions before commercial courts.[13]

The first section also addresses parties' summons[14] and the sanctions that the court may inflict on any litigant who may engage in dilatory tactics,[15] and deals with confidentially issues[16] and the time frame for courts to issue its verdicts throughout the different stages of the procedure.[17]

The second section, entitled "Jurisdiction", defines the commercial courts' jurisdiction and specifies one by one the type of disputes that fall under their competency.[18] It removes the confusion created by the ambiguous jurisdiction provisions that prevailed under the old regime and would by the same logic limit the conflicts of jurisdiction between the general courts (dealing with civil matters) and the commercial courts with all the associated delays.[19]

Sections three to five of the CCL, respectively entitled "Registration of the Lawsuit", "Hearing the Dispute", and Parties' Absence and Attendance", contain a set of rules dealing mainly with the conduct of the procedure. Section six deals with "Emergency Claims".

Section seven of the CCL, entitled "Evidence" and which deals with the production of evidence before commercial courts, is certainly one of the most innovative aspects of the CCL. It sets forth in its first subsection general principles related to evidence, such as parties' freedom to agree—upon the satisfaction of a certain number of conditions—on the rules governing the production of evidence.[20] The

7. CCL, art. 1.
8. CCL, art. 5.
9. CCL, art. 6.
10. CCL, art. 7.
11. CCL, art. 8.
12. *Ibid.*
13. *Ibid.*
14. CCL, art. 9.
15. CCL, art. 13.
16. *Ibid.*
17. CCL, art. 14.
18. CCL, art. 16.
19. Under the old regime, the conflict of jurisdiction between civil and commercial courts had to be referred to the Supreme Judicial Council to decide on the jurisdiction.
20. CCL, art. 38.

other eight subsections contain each detailed provisions in respect of each means of evidence that may be used before commercial courts: the admission, the written proof, the witnesses, the judicial oath, the interrogation, the electronic evidence, the expertise and the commercial custom. Section seven has been repelled by the new law of evidence ("**Evidence Law**") which sets forth new rules for evidence before both civil and commercial courts, largely inspired by the deleted section 7 of the CCL.[21]

In section eight entitled "The Rendering of Judgments", the CCL addresses the process of issuing the judgment by the courts and the conditions that the final judgment should satisfy. Section nine, entitled "Payment Orders", deals with payment orders and institutes a specific system for the payment of debts established in writing.

Section ten, entitled "Recourse against Judgments", enounces the available recourses against judgments—appeal, petition for review and cassation—and makes it possible for parties to agree on the finality of the first instance judgment by waiving their rights to appeal.

Finally, section eleven, entitled "Final Provisions", contains final provisions addressing, among other things, the relation between the CCL and other laws, and provides for the publication of all decisions issued by commercial courts.

B. THE ATTRACTIVENESS OF SAUDI COMMERCIAL COURTS FOR THE RESOLUTION OF COMMERCIAL DISPUTES

I. The Efficiency of the Commercial Court Procedure

In the context of dispute resolution, efficiency is generally assimilated with the cost and time of a given adjudicative system. Procedural efficiency is generally considered as one of the advantages that arbitration may offer to parties as compared to litigation. With the enactment of the CCL, parties to a commercial dispute have the option to litigate their dispute in an efficient manner due to a certain number of provisions that aim at reducing litigation time and costs.

a-Reducing Commercial Court Caseload

The CCL contains a certain number of provisions that seek to reduce commercial court caseload.

The heavy and burdensome caseload of applications before State courts along with the bureaucracy associated with adjudicative public bodies are one of the main reasons behind the choice of a private court for the resolution of a dispute. The CCL contains a certain number of provisions that seek to reduce commercial court caseload and hence allow the resolution of commercial disputes in an efficient and timely manner.

Articles 3 of the CCL, which envisages the creation of commercial courts within different provinces and regions across Saudi Arabia, falls within such objective. Indeed, the creation of several commercial courts, particularly outside major cities would certainly decrease the commercial courts' caseload, as the disputes would be allocated to geographically different courts.

Despite the growing interest in conciliation and mediation in recent years, such alternative means for settling disputes are not popular within the litigation culture in Saudi Arabia.

The obligation of recourse to reconciliation in certain types of commercial disputes[22] before filing the case is another provision that allows parties to save time and money by forcing them to sit together in an attempt to settle their dispute amicably as a condition precedent for bringing any claim before commercial courts. Despite the growing interest in conciliation and mediation in recent years, such alternative means for settling disputes are not popular within the litigation culture in Saudi Arabia. In fact, when a dispute arises, parties are more inclined to escalate the matter by seizing the courts than trying to reach an amicable settlement with their counterpart. By being legally compelled to try to settle the dispute amicably, the CCL infiltrates the concept of conciliation onto the litigation culture in Saudi Arabia and promotes judicial efficiency by making parties sit together on the same table before litigation, which may possibility result in cost and time savings should they succeed in reaching an amicable settlement to their dispute.

In the same vein, referring parties to a mandatory amicable settlement before bringing their claims to courts is beneficial for the court system itself, as it curbs the flow of cases and consequently improves the quality of justice. While recourse to amicable settlement is also encouraged in arbitration—as the expansion of escalating dispute resolution clauses may witness—this may not be possible without the parties' consent, which makes the commercial court mandatory reconciliation system more efficient when compared to arbitration.

b-Remote Litigation

For the first time in Saudi Arabia, it is possible for litigants to conduct the entire proceedings remotely through electronic means.

For the first time in Saudi Arabia, it is possible for litigants to conduct the entire proceedings remotely through electronic means. Indeed, the CCL has introduced e-filing procedures and parties have the option to conduct the entire dispute remotely, whether in terms of claim registration, memorandum submissions, virtual hearings, issuance of the judgment and appeal against the court's electronic verdict.[23]

Remote litigation has many benefits in terms of cost and efficiency—especially in the context of international disputes where parties' place of business is located in different countries—with saving on transportations costs, travel time, and other associated costs. The possibility to carry out remote litigation makes commercial courts in Saudi Arabia as competitive as arbitration where the practice of conducting parts of the proceedings remotely (such as case management conferences) dates for more than a decade and tends following

21. Royal Decree No. M43/1443, dated 26/5/1443H (corresponding to 30 December 2021) on the approval of the Evidence Law.

22. CCL, art. 8.

23. CCL, art. 7.

the COVID-19 pandemic to be more general and expands to the entire proceedings including the hearings.[24]

c-Cooperation with the Private Sector

> *By making possible the privatization of a certain number of judicial services, the CCL allows parties to avoid bureaucracy, lack of professionalism, and delays associated with public courts.*

Cooperation between the courts and the private sector—subject to the satisfaction of a certain number of conditions—is another concrete concretization of the CCL's objective to foster judicial efficiency.[25] By making possible the privatization of a certain number of judicial services, the CCL allows parties to avoid bureaucracy, lack of professionalism, and delays associated with public courts. The possibility of recourse to the private sector for the purpose of carrying out conciliation and negotiations between parties, notifying and servicing the process, and ensuring case management (e.g., case registrations, management of the courtrooms, and exchange of memorandums) would put parties before commercial courts in a similar position to parties to arbitration in terms of advantages offered by the private sector, notably in terms of speed and efficiency.

d-Neutralization of Dilatory Tactics

> *While the New Arbitration Law also has provisions aimed at preventing parties from engaging in dilatory tactics, these provisions are more permissive than those enshrined in the CCL.*

Parties to litigation sometimes engage in dilatory tactics by exploiting rules of civil procedure, which in most of the legal systems give parties a way to delay the proceedings. The CCL consecrates a number of provisions to counter such behaviour. While the New Arbitration Law also has provisions aimed at preventing parties from engaging in dilatory tactics, these provisions are more permissive than those enshrined in the CCL.

The delimitation of the jurisdiction of the commercial courts is one of the major virtues of the CCL in terms of countering parties' dilatory tactics. Article 16 expressly enumerates the types of differences falling within the competency of commercial courts and breaks with the ancient regime, under which the broad reference of the Sharia Procedure Law to "*any commercial dispute*" as a matter to be included within the jurisdiction of commercial courts resulted in jurisdictional conflicts between civil and commercial courts and also opened the door for the parties to engage in dilatory tactics by raising jurisdictional pleas. The existence of clear and express provisions determining the competence of commercial courts is such that jurisdictional challenges are less likely to arise in the future. In addition, if a conflict arises for whatever reason, it should be decided by the commercial court itself within 20 days of the date of the challenge, which would certainly neutralize the impact of any tactical jurisdictional challenges engaged by any of the parties on the efficient resolution of the dispute.[26]

Jurisdictional challenges also arise in the context of arbitration, and the New Arbitration Law puts a time frame for the parties to challenge the jurisdiction of the arbitration tribunal.[27] However, the New Arbitration Law does not impose a time frame for determining its jurisdiction, nor does it expressly vest the arbitral tribunal with the power to bifurcate the proceedings such that the arbitration tribunal makes its determination on its jurisdiction before examining the merits of the dispute. The CCL provisions in relation to the plea on jurisdiction seem to be more time- and cost-efficient than those under the New Arbitration Law.

Another important provision which fosters efficiency of procedure and prevents parties from engaging in dilatory tactics is the one allowing the court to impose fines on any party failing to submit what has been requested by the Court in the prescribed time frame or to reject parties' additional claims or counterclaims.[28]

> *Parties are entitled to amend their claim or defence at any time of the proceedings, unless the arbitral tribunal decides otherwise in order to prevent delay in the issuance of the award.*

The provisions embraced by the New Arbitration Law appear more permissive and less efficient. Parties are entitled to amend their claim or defence at any time of the proceedings, unless the arbitral tribunal decides otherwise in order to prevent delay in the issuance of the award.[29] In other words, the principle underlying the New Arbitration Law is parties' freedom to amend their statement of claim or defence at any time, thus allowing parties to use this provision to delay the proceedings. It is the author's view that in the absence of a time-frame for the parties to make such amendments, an arbitral tribunal will most likely accept a party's request to amend its statement of claim or defence in order to protect the award from any action for setting aside on account of violation of party's right to present its case.

The CCL has a flexible approach to the requirements for notifying a defendant of a lawsuit, and considers the defendant notified in person even if the defendant has not been personally served with the notice, provided that the notification has been sent twice.[30] This provision prevents the defendant from escaping the personal notification of the lawsuit in order to invoke at a later stage the *"in absentia nature"* of the judgment, which would grant the defendant the right to file an opposition against the judgment and open the trial again, thereby extending the timeframe for resolution of the dispute. A similar provision is contained in the New Arbitration Law.

24. *See* Maxi Scherer, Remote Hearings in International Arbitration: An Analytical Framework, 37(4) J. of Intl Arb. (2020).

25. CCL, art. 5.

26. CCL, art. 18.

27. In accordance with Articles 20 and 30 of the Arbitration Law, the plea to the jurisdiction of the arbitral tribunal shall be raised by the defendant along with his statement of defence.

28. CCL, art. 26.

29. Arbitration Law, art. 22.

30. CCL, art. 30.

In the absence of a special agreement between the parties in respect to notifications, notification must be specified in the contract. In the event the notification cannot be delivered in accordance with the above, the notification will be considered as achieved if it is done by registered letter to the defendant's last place of work or usual place of residence, or a known postal address of the defendant.[31]

In order to prevent abusive litigation by the claimant, the CCL provides the possibility for the defendant to request from the Court either the deregistration of the lawsuit or the issuance of a judgment where the claimant, without submitting a valid reason, fails to appear before the Court. In this scenario, and despite claimant's non-appearance before the Court, the judgment will be considered as opposable to the claimant, which will bar the claimant from filing an opposition against the judgment in order to open the trial again.[32] In the context of arbitration and if the claimant does not provide a written statement of the claim in accordance with the prescribed timeframe, the arbitral tribunal will terminate the arbitration proceedings, unless the parties agree otherwise.[33] There is no possibility for the defendant to request the Court to render an award.

e-Efficient Case Management

The New Arbitration Law is silent regarding the conduct of case management meetings.

The case management conference is generally associated with the arbitration practice where the arbitral tribunal convenes a preliminary meeting with the parties in order to ascertain and limit the key areas of the dispute and discuss procedural timetables for the purpose of managing the case in a timely and cost-efficient manner. The CCL envisages the possibility of conducting case management meetings. In this respect, the Court should conduct a preliminary meeting before the hearings to ensure that the hearings are carried out efficiently and that the parties will not attempt to engage in dilatory tactics that may result by invoking jurisdiction pleas or other procedural issues to diverge the hearings on the merits of the dispute. During this meeting, the Court ascertains the admissibility of the claim and its jurisdiction to hear the dispute, identifies and defines parties' claims, determines the complexity level of the dispute and sets forth a plan for the management of the case.[34] By settling these preliminary matters, the hearings will be fully consecrated to the examination of parties' respective claims and defences. The New Arbitration Law is silent regarding the conduct of case management meetings. This does not mean that the parties could not agree on this or subject their proceedings to a set of rules for the conduct of a case management meeting. However, by making the preliminary meeting mandatory rather than dependent on parties' consent, the CCL appears to promote and enhance efficiency more than the New Arbitration Law does.

f-The Consecration of a Class Action Procedure

The consecration of a class action procedure before the commercial courts may also be analyzed as falling within the objective of legal efficiency advanced by the CCL.[35] By definition, a class action is a procedure that allows claimants having suffered similar or identical harm to bring aggregated claims against one or more defendants. The Saudi regulator has already introduced a class action procedure in the context of securities disputes by virtue of the Amended Regulations of Procedures for the Resolution of Securities Disputes.[36]

Legal efficiency is one of the various functions that a class action procedure may pursue. Legal efficiency benefits both the parties and the legal system alike. In what pertains to claimants, a class action procedure allows those with small claims and who may be deterred from pursuing a legal action due to the economic costs associated with the lawsuit to access justice in an efficient way. Indeed, by permitting several claimants to band together to press their claims, the class action incites the economically most vulnerable parties to overcome the economic barriers impeding their access to justice by making it worthwhile to take their case to court. Regarding the defendant, and in the absence of a class action, the latter may be obliged to appear indefinitely before courts in order to defend itself against similar or identical allegations and would therefore be exposed to the risk of being subject to inconsistent or even contradictory orders. When claims are aggregated into a single procedure, the defendant is able to envisage the set of procedural rules that will apply during the trial and to concentrate its defences before a single court in order to reach global peace with all the defendants in an efficient manner.

The aggregation of several claims into a single procedure results in an economy of judicial resources and consequently in a better quality of justice both in terms of time and resources.

The efficiency function of a class action procedure extends to the legal system within which it operates. Indeed, the engagement of several legal actions concerning the same subject matter would overwhelm the court system and undermine the quality of justice. It would also increase the risk of inconsistent judgments regarding similar or related claims. The aggregation of several claims into a single procedure results in an economy of judicial resources and consequently in a better quality of justice both in terms of time and resources.[37]

The engagement of a class action in the context of arbitration is a salient topic which has been the subject of divergent opinions in the arbitration milieu.[38] The New Arbitration Law is silent on this matter. It also does not discuss other important issues related to multiparty arbitration and consolidation of claims. This makes the CCL more advanced than the New Arbitration Law regarding multi-party disputes and consolidation, and therefore promotes more efficiency in dealing with such issues.

g-Time Frame for Litigation

Commercial courts are bound to render their verdicts within the time frame set by the CCL, which is 180 days for judgments issued by

31. Arbitration Law, art. 6.
32. CCL, art. 31.
33. Arbitration Law, art. 34.
34. CCL, art. 28.
35. CCL, art. 8.
36. Amer Tabbara, "Group Actions in the Middle East", The MENA Business Law Review, No. 1/2019.
37. *Ibid.*
38. M. W. Nissen, "Class Action Arbitrations: AAA vs. JAMES, Different Approaches to a new concept", 11 Dis. Resol. Mag. 19 (2005).

the courts of first instance (six months), 20 days for judgments issued by the courts of appeal in the context of proceedings held without hearings, and 90 days (three months) for appeal proceedings other than those which do not require the carrying on of hearings.[39]

In other terms, the resolution of the dispute may take a maximum period of nine months between the courts of first instance and court of appeal, which is a relatively a short period. The law is silent on the time frame for the court of cassation to issue its judgment; however, this would not have a direct impact on the speed of the proceedings on the basis that cassation does not stay the execution of the judgments unless otherwise decided by the Cassation Court.[40]

The resolution of a dispute before the Commercial Court appears to be faster when compared to the time frame set for an arbitration tribunal to render its award under the New Arbitration Law. In the absence of any agreement between the parties in respect of the date of the issuance of the award, the arbitral tribunal should hand over its award within 12 months from the date of commencement of the arbitration proceedings, with the possibility for an extension for a maximum period of six months.[41] In other words, under the New Arbitration Law, one should envisage a period of 18 months for the resolution of a dispute with a single degree of jurisdiction, which exceeds the time frame for the resolution of a dispute in first and second instances before commercial courts. It should be mentioned that the period of 18 months may be extended should the arbitral tribunal fail to deliver the arbitral award in accordance with the aforementioned time frame or if a party files a request to the Competent Court to issue an order for an additional period.

h–Waiver of the Right to a Dual Level of Jurisdiction

Under the CCL, it is now possible for parties to waive their right to appeal and to have their dispute finally settled after the rendering of the verdict by the courts of first instance

The principle of the right to a dual level of jurisdiction enshrined in most legal systems may delay the resolution of the dispute by allowing any dissatisfied party to file an appeal of the first instance court's decision and to reopen the case before a superior court. It has always been mentioned that the final and binding nature of the arbitral award is one of the most important advantages of arbitration over litigation, as it allows the final settlement of a dispute within a relatively short period. Under the CCL, it is now possible for parties to waive their right to appeal and to have their dispute finally settled after the rendering of the verdict by the courts of first instance.[42]

II. Flexibility of the Procedure

Parties' freedom to fashion their own procedure is one of the advantages of arbitration over litigation, as it allows parties to avoid the rigidity of State courts' procedural rules. Such statement may not be accurate anymore in Saudi Arabia where the CCL offers the parties the right to design their own procedure in similar fashion to arbitration.

a–Parties' Autonomy in Respect to the Procedure

Under the Arbitration Law, parties may decide on several aspects of the procedure, such as the number of written submissions, the timeframe between submissions, and the conduct or not of hearings.[43] This option is in principle not possible before State courts in Saudi Arabia, as parties are generally bound by the rules of civil procedure consecrated by the court hearing the disputes. The CCL offers parties the possibility to design their procedure the way they deem fit by giving effect for the first time in Saudi Arabia to procedural contracts before State courts. Parties may agree by way of written procedural contracts—and within the respect of the Saudi Public Order and the general principles of justice—on specific provisions for the conduct of the proceedings such as the number of written pleadings, the means of notification, deadlines for submissions, the strategy for the administration of the lawsuit and the reduction of the procedural deadlines except for court's time frame to render the award. The admission of procedural contracts before commercial courts gives the parties the flexibility generally sought in the context of the resolution of commercial disputes and makes commercial courts as competitive as arbitration in this respect.

b–Flexibility Regarding Rules of Evidence

The parties' freedom to design their rules of evidence is considered as one of the main characteristics of arbitration, especially in the context of international disputes where parties coming from different legal systems may wish to design rules of evidence that take into account the legal culture of each party. This option is now open for parties in the context of litigation and parties can now agree on specific rules of evidence when solving their disputes before Saudi commercial courts. This provision is particularly important when the parties do not come from the same legal system (i.e., in the context of an international dispute) or if both parties come from a legal system other than the Saudi legal system. Instead of being compelled to litigate according to Saudi rules of evidence or resort to arbitration in order to escape the rigidity of the Saudi procedural law, parties may now fashion their rules of evidence the way they deem appropriate, whether the dispute is international or completely located within the Saudi borders. This possibility is no longer a specificity of litigation before commercial courts following the enactment of the Evidence Law, which gives parties litigating before Saudi courts—not only commercial courts—the right to agree on the applicable rules of evidence.[44]

It is undeniable that commercial courts as reshaped by the CCL could now be considered by business actors as a serious option for the adjudication of their disputes, and therefore a competitor to arbitration. Despite the above, it is the author's view that the competitiveness of commercial courts will be limited to domestic disputes and that it is unlikely that such courts will be perceived as an attractive forum for the resolution of regional or international disputes.

39. CCL, art. 14.
40. Sharia Procedure Law, art. 196.
41. Arbitration Law, art. 40.
42. CCL, art. 74.
43. CCL, art. 6.
44. Evidence Law, art. 6.

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The Unattractiveness of Saudi Commercial Courts in Cross-Border Commercial Disputes

The competition between State courts and arbitration for the resolution of international commercial disputes is a theme of current reality. Some States' domestic courts, such as London and New York commercial courts, have been traditionally considered attractive to foreign parties because of their flexible procedural rules designed to accommodate complex commercial cases. Recently, many States around the world are establishing courts specializing in international commercial disputes, generally referred to as "international commercial courts".[45] Specialized circuits for the resolution of international commercial disputes have been created in a number of jurisdictions and offer competitive and high profile judicial services to litigants both in terms of efficiency and flexibility of the procedure and in terms of judges' expertise.

At first sight, Saudi commercial courts seem to incorporate the same characteristics of international commercial courts: they are innovative, cost effective, technologically state of the art, and incorporate desirable characteristics of arbitration by allowing procedural arrangements between the parties.

At first sight, Saudi commercial courts seem to incorporate the same characteristics of international commercial courts: they are innovative, cost effective, technologically state of the art, and incorporate desirable characteristics of arbitration by allowing procedural arrangements between the parties. Moreover, since Saudi law gives effect to parties' choice of Saudi Courts as a forum for the resolution of international commercial disputes, Saudi commercial courts should logically be perceived as an attractive forum for the resolution of cross-border commercial disputes and a serious competitor to arbitration.

However, a number of omissions within the CCL may neutralize the competitiveness of Saudi Courts commercial courts, especially in the context of regional and international disputes. It is not clear whether by enacting the new CCL, the Saudi Regulator has perceived or envisioned any possible role for Saudi commercial courts to play at the regional or international level or whether the Saudi regulator has any aspiration to transform Saudi commercial courts as a hub for the adjudication of international commercial disputes. Even if such objective is not sought *per se*, it is clear that all legal reforms taking place in Saudi Arabia fall within the broader 2030 vision, a cornerstone of which is to attract foreign investment. It is also known that attracting international investment cannot be achieved without providing a business-friendly legal jurisdiction and that a business- friendly legal jurisdiction needs more than the new features consecrated by the CCL, as we shall see. Indeed, issues related to the language of the proceedings, judges' training, and the absence of private international law provisions might negatively affect the aptitude of Saudi commercial courts to play any role in the adjudication of international commercial disputes. A number of provisions could be introduced by the Saudi Regulator in order to fill the existing gaps.

A. LINGUISTIC BARRIERS

Many specialized courts dedicated to the resolution of international commercial disputes and established in a certain number of jurisdictions such as France, Belgium and the Netherlands are English-friendly and therefore offer for the parties the possibility to litigate their dispute using the English language, as English is the preferred language of business and is one of the most widely spoken languages in the world. It may also be possible for experts, third-party witnesses and legal counsel to speak in English during the hearings before such courts.[46]

The CCL is silent regarding the possibility for parties to choose the English language for the proceedings.

The CCL is silent regarding the possibility for parties to choose the English language for the proceedings, which may make parties to international business transactions reluctant to resort to Saudi commercial courts by way of forum selection clauses or encourage them to exclude such courts by way of arbitration or forum selection clauses designating foreign courts. A large number of commercial transactions in Saudi Arabia, whether domestic or international, are drafted in English[47] and it is most likely that parties to such transactions would be skeptical to litigate their dispute in Arabic with all the hurdles and costs associated with document translation. This gap should be addressed by the Saudi Regulator, especially given that the possibility of litigating in a language other than Arabic is an available in other developed Gulf jurisdictions. For instance, international commercial courts in Qatar, Dubai and Abu Dhabi have transplanted English judicial practices and allow parties to litigate using the English language.[48]

B. JUDGES' QUALIFICATIONS

Many of the international commercial courts appoint judges having substantive experience in the adjudication of international commercial disputes. To mention a few examples, the DIFC courts have six foreign judges and three Emirati judges all of which are specialized in the resolution of international commercial disputes.[49] Similarly, the division of the International Commercial Court in Paris is staffed by French judges who speak English and have familiarity with English common law.[50]

45. P.K. Bookman, "The Adjudication Business", 45 Yale J. Int'l L. 227 (2020).

46. A .K. Bookman, "*The Adjudication Business*", *op.cit.*, at 253.

47. According to a survey organized by Queen Mary University of London, 52% of the contracts drafted in English in the Middle East chose London as the seat of jurisdiction for disputes.

48. A. K. Bookman, "The Adjudication Business", *op.cit., at 239 et seq.*

49. See DIFC Courts, *https://www.difccourts.ae.*

50. A.K. Bookman, "The Adjudication Business", *op.cit.*, at 253

Unfortunately, the reform of the Saudi commercial courts has not been accompanied by new rules regarding the conditions of appointment of Saudi commercial judges

Unfortunately, the reform of the Saudi commercial courts has not been accompanied by new rules regarding the conditions of appointment of Saudi commercial judges which take into account the principles of specialty of these courts and its potential role as a catalyst for the resolution of regional and international commercial disputes. Indeed, the appointment of commercial judges is subject to the same conditions as other sharia judges in Saudi Arabia and even more commercial judges are not required to have a specialization in law but should only hold a degree from one of the Sharia Colleges in the Kingdom as a prerequisite to their appointment.[51] Against this background, it would be doubtful for parties—except those who wish to subject their transaction to sharia—to choose a sharia background judge who is most likely unfamiliar with the principles of international commercial law to adjudicate their cross-border commercial transactions.

One solution that the Saudi Regulator may wish to consider is the creation—within the realm of commercial courts—of a chamber specifically dedicated to hear international commercial disputes.

One solution that the Saudi Regulator may wish to consider is the creation—within the realm of commercial courts—of a chamber specifically dedicated to hear international commercial disputes, where judges must be subject to a special appointment procedure which take into account his or her expertise in international commercial law, fluency in English and familiarity with common law procedure.

C. ABSENCE OF WELL-DEVELOPED PRIVATE INTERNATIONAL LAW PROVISIONS WITHIN THE SAUDI LEGAL SYSTEM

Private international law is still an unexplored area of law in Saudi Arabia. In what pertains to conflicts of jurisdictions, the Sharia Code of Civil Procedure is the only text containing succinct provisions dealing with the jurisdiction of Saudi Courts in the context of international disputes.[52]

When it comes to conflicts of law provisions, the New Arbitration Law is the first regulatory piece with provisions dealing with such matters. The New Arbitration Law consecrates parties' autonomy in respect to the law applicable to the merits of the dispute and is the first provision in the Saudi legal system that admits the possibility for parties to choose a foreign law to govern their different. Furthermore, the New Arbitration Law contains a conflict of laws rule dealing with the absence of a choice of law made by the parties.[53] In such a scenario, the arbitral tribunal should apply the substantive rules of the law it considers the most relevant to the subject of the dispute.[54] This provision is an innovation in Saudi Arabia. In fact, the Saudi legal system does not contain provisions addressing conflicts of law issues, nor have Saudi Courts filled this gap by developing a jurisprudential arsenal dealing with matters associated with private international law.

It is unfortunate that the CCL remains silent on the possibility for parties to choose foreign law to govern their dispute when the dispute is of an international nature, or on the possibility for Saudi judges to apply foreign laws to the merits of the dispute when a transaction is connected with a foreign legal system

It is unfortunate that the CCL remains silent on the possibility for parties to choose foreign law to govern their dispute when the dispute is of an international nature, or on the possibility for Saudi judges to apply foreign laws to the merits of the dispute when a transaction is connected with a foreign legal system. This absence undermines any possible role for Saudi commercial courts in the adjudication of international commercial disputes, especially given that the choice of foreign law, especially English law, is a common practice for parties involved in transactions connected to the Saudi legal order and that all international commercial courts actively involved today in the adjudication of international commercial disputes robustly enforce choice of law provisions so that parties get the substantive law of their choice.

In the context of arbitration, there are uncertainties revolving around the possible application of foreign law to the merits of a dispute in the context of Saudi arbitrations. It is the author's view that such uncertainties present themselves in a similar way in the context of litigation before commercial courts. In fact, in the context of arbitration, any law chosen by the parties or applied by the arbitrator should be compliant with sharia and with Saudi public policy.[55] The same would probably apply before Saudi courts. While it may be legitimate for a legal order connected to a dispute to have its mandatory rules apply, despite any choice of law made by the parties, the specificity of Saudi law, which is sharia-based, calls for several comments.

First, the identification of mandatory rules that may apply to international transactions having connection with the forum irrespective of any choice of law made by the parties or the applicable conflict of law rule is the result of tremendous intellectual work deployed essentially by the jurisprudence[56] and doctrine in most developed jurisdictions where private international law is considered a

51. Royal Decree No. M78/1428 H (corresponding to 1 October 2007) on the Law of the Judiciary, art. 31.

52. Royal Decree No. M21/1421 on the Law of Procedure before sharia courts, 20 Jumada I, 1421 (19 August 2000), Articles 24 et seq.

53. See Arbitration Law, art. 38.1.B, which provides: *"If the parties of the arbitration do not agree on the statutory rules applicable to the subject of the dispute, the tribunal shall apply the substantive rules in the law that it considers the most relevant to the subject of the dispute."*

54. Article 27 of the Arbitration Law provides that: *"Subject to provisions of sharia and public policy in the Kingdom, the arbitration tribunal shall, when deciding a dispute, consider the following:*

a. Apply to the subject matter of the dispute rules agreed upon by the arbitration parties If they agree on applying the law of a given country, then the substantive rules of that country shall apply, excluding rules relating to conflict of laws, unless agreed otherwise.

b. If the arbitration parties fail to agree on the statutory rules applicable to the subject matter of the dispute, the arbitration tribunal shall apply the substantive rules of the law it deems most connected to the subject matter of the dispute."

55. Arbitration Law, art. 27.

56. G. Radicati di Brozolo, Luca, "Arbitrage commercial international et lois de police : considérations sur les conflits de juridictions dans le commerce international", 315 RCADI 265, 308 (2005).

well-established branch of law.[57] As mentioned earlier, the notion of private international law is still unexplored in the Kingdom and there are no jurisprudential or doctrinal foundations on which one could rely in order to identify Saudi mandatory rules that may apply to international transactions having a connection with the Saudi forum.

More importantly, being a sharia-based legal system, it would be hard to identify mandatory rules, as there is no such distinction between mandatory and non-mandatory rules when it comes to provisions dictated by God. As rightly pointed out, sharia is by definition "*personal and absolute*".[58] As a result and despite the theoretical possibility for parties to choose the law applicable to the contract or for the arbitrator/judge to apply the law with the strongest connection with the dispute, the conformity to sharia—which is all mandatory—may render such options practically obsolete,[59] especially since the principles of sharia contract law differ largely from contract principles embraced by other legal systems.

57. For doctrinal work, see, e.g., Pierre Mayer, *Mandatory Rules of Law in International Arbitration* 2(4) Arb. Int. 274 (1986); M. Blessing, *Mandatory Rules of Law versus Party Autonomy in International Arbitration,* 14(4) J. Int. Arbitr. 23 (1997).

58. Nathalie Najjar, "Sharia Applicable to the Merits in International Commercial Arbitration" *in* Liber Amicorum Samir Saleh, *Reflections on Dispute Resolution with Particular Emphasis on the Arab World* 215, 227 (Kluwer Law International, 2009).

59. Fadi Nammour, *De l'applicabilité de la charia islamiya dans l'arbitrage international*, available at: https://www.academia.edu/6698880/De_l_applicabilit%C3%A9_de_la_charia_islamiya_dans_l_arbitrage_international.

It is not clear whether Saudi commercial courts would enforce choice of law clauses or would neutralize such clauses by automatically applying sharia law as mandatory law.

Against this background, it would have been expected that the Saudi Regulator address within the CCL conflict of law issues to dissipate the uncertainties described above. In the absence of such provisions, it is unlikely that parties to an international transaction governed by a foreign law would choose Saudi courts for the resolution of their disputes, as it is not clear whether Saudi commercial courts would enforce choice of law clauses or would neutralize such clauses by automatically applying sharia law as mandatory law. Therefore, an express provision like the one existing in the Arbitration Law should enforce the parties' choice of law and allow the court to determine the law applicable in the absence of any such choice. However, for this choice of law to be effective, the exception of the Saudi public order would have to be clearly defined and be subject to a narrow interpretation, in the sense that a more lenient approach in respect of public policy would be embraced by the courts when the dispute was of an international nature. This could be achieved through a new implementing regulation requesting the courts to lower the intensity of the Public policy conformity test when the dispute was international and being heard by the international chamber.

يهدف قانون المحاكم الجديد إلى إعادة تشكيل القضاء التجاري وجذب النزاعات التجارية إلى المحاكم التجارية السعودية من خلال ضمان حلول فعالة للنزاعات التجارية وفقا للمعايير الدولية.
ويبين بوضوح تحليل الأحكام الرئيسية في قانون الشركات التجارية سمات التقاضي الحديثة الواردة في هذا القانون الجديد. تقدم المحاكم التجارية السعودية التي أعيد تشكيلها بموجب قانون الشركات التجارية عددا من الخصائص التي يمكن مقارنتها بالمحاكم التجارية الدولية القائمة الأخرى والمشابهة للتحكيم حيث أنها مبتكرة وفعالة من حيث التكلفة وتستخدم التكنولوجيات الحديثة.
لكن لا يخلو قانون الشركات التجارية الجديد من العيوب. في الواقع، لم يضع المشرع بعض الأحكام المهمة في هذا القانون مما قد يقلل إلى حد ما من جاذبية المحاكم التجارية لا سيما في سياق النزاعات الإقليمية والدولية.
هناك بعض الاقتراحات التي ربما يأخذها المشرع بعين الاعتبار حتى يحسن من فرص المحاكم التجارية السعودية لتكون منصة محتملة للفصل في النزاعات التجارية عبر الحدود.

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Regulation of Cryptocurrencies in Iran

Economic Illusion or Game Changer?

Cryptocurrencies are no longer limited to the geek community or a handful of financial investors. They are a significative part of global finance. Hence national or international authorities and regulators, including in the Middle East, are taking a position on cryptocurrencies and updating their regulations.
Cryptocurrencies are not something new for the Islamic Republic of Iran. However, the economic situation has moved the country to further elaborate its regulations and use cryptocurrencies as a tool to leverage economic development despite US sanctions. Cryptocurrencies in Iran, as well as other jurisdictions, can have an effect on economic opportunities, albeit limited. Central Bank Digital Currencies could be a game changer since they address most of the challenges posed by independent cryptocurrencies. In this

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Les crypto-monnaies ne se limitent plus à la communauté des geeks ou à une poignée d'investisseurs financiers. Elles constituent une part significative de la finance mondiale. Ainsi, les autorités et régulateurs nationaux ou internationaux, y compris au Moyen-Orient, prennent position sur les cryptomonnaies et actualisent leur réglementation.
Les crypto-monnaies ne sont pas quelque chose de nouveau pour la République islamique d'Iran. Cependant, la situation économique a poussé le pays à sophistiquer davantage sa réglementation et à utiliser les crypto-monnaies comme un outil pour tirer parti du développement économique malgré les sanctions américaines. Les crypto-monnaies en Iran, ainsi que dans d'autres pays, peuvent avoir un effet sur les opportunités économiques, bien que limité. Les monnaies numériques des banques centrales pourraient changer

.../...

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regard, the recent Iranian E-Rial project has the potential to boost trade and investment opportunities... if Iran opts for an audacious legal framework.

la donne car elles répondent à la plupart des défis posés par les crypto-monnaies indépendantes. À cet égard, le récent projet iranien E-Rial a le potentiel de stimuler les opportunités de commerce et d'investissement... si l'Iran opte pour un cadre juridique audacieux.

Unseen characters have been used, with great success, from Sophocles' Oedipus Rex to Seinfeld's "Cousin Jeffrey". They are, despite their silence, on everyone's lips and at the root of most actions, such that their absence has a global effect on the play. The silent character in Iran's economic tragicomedy is about to stand up under the light and interact directly into the play. After years of ever-recurring issues, Iran is adopting a Central Bank Digital Currency (**CBDC**) adding to its fast-evolving regulation of crypto-currency production, use, and trade. This project is designed to enhance the economy, but twist in the plot may develop.

Iranian authorities have just confirmed the arrival of an E-Rial pilot for the Iranian year 1401 (starting from 21 March 2022 in the Gregorian calendar).[1] This announcement did not come out of the blue, since Iran, like 80% of countries,[2] has been long considering issuing a CBDC. However, Iran might be among the first country to have an effective CBDC, most likely right after the Chinese E-Yuan.

More classical cryptocurrencies are not unknown in Iran, as the country is among the first mining jurisdiction due to the price of electricity. Both notions—CBDC and cryptocurrencies—need to be put into context. The codification of the Iranian cryptocurrency regulation is on a fast track but is still incomplete. At this stage, a number of instruments have been enacted by the Cabinet of Ministers, the Central Bank of Iran (**CBI**) and other governmental bodies. The current and announced regulation covers independent crypto-currencies (mining, internal and external trading, Initial Coin Offering, Tokens at large) but also CBDC as well as similar projects. We can now have a good Iranian cryptocurrencies policy overview, including through the publication of the Research Center of Parliament.

A cryptocurrency is a digital asset generated by cryptography, issued through peer-to-peer verification and recording, rather than by a centralized authority.

A cryptocurrency is a digital asset generated by cryptography, issued through peer-to-peer verification and recording, rather than by a centralized authority. Blockchain technology now allows safe registration of the movements of value, hence transactions, without banks. Bitcoin meets the three functions of money: a unit of account with 21 million units divisible up to the 8th decimal, a medium of exchange even outside of the internet or with a card, and a storage of value. Other cryptocurrencies are sometimes based on gold or the US dollar (i.e., stable coins).

A CBDC is an electronic record or digital token of a country's official currency. Contrary to fiduciary money, the CBDC is based on block-chain technology, which means, similar to a classical cryptocurrency, a safe ledger of all transactions pertaining to the relevant currency. As an official State currency, it is issued and regulated by a Central Bank and backed by the full faith and credit of the issuing government. So far, the development of CBDCs around the world is very unequal, and China has the most ambitious and advanced project. Projects of E-Euros and E-Dollar have also been announced.

The question of cryptocurrency in Iran, including a CBDC, goes far beyond a technological stake. The stakes are financial (being linked to world finance despite bank overcompliance), regulatory (opposing US secondary sanctions), economic (facilitating trade and investment), and geopolitical. Hence, the situation of cryptocurrencies in Iran must be analysed according to the situation in the region or with trade partners beyond the Middle East, such as China, Russia or the European Union. This article intends to study the potential economic impact of the new regulation and draw perspectives of evolution, especially when it comes to the issue of US secondary sanctions.

1 Independent Cryptocurrencies: Compromising to Enhance Trade

To date, the Iranian cryptocurrency regulatory landscape consists in:

- one resolution adopted by the Combating Money Laundering Supreme Council to ban the use of cryptocurrencies by banks;[3]

1. National cryptocurrency instruction approved by the Monetary and Credit Council, Mehrnews, 24 January 2022, https://bit.ly/3AxVWhj.

2. Bank for International Settlements, Central bank digital currencies: foundational principles and core features, Report (2020) https://www.bis.org/publ/othp33.pdf.

3. Resolution approved by the Supreme Council for Combating Money Laundering (2017-12-30), https://www.cbi.ir/showitem/17722.aspx.

- two resolutions passed by the cabinet regarding mining;[4]
- a draft regulation by the CBI;[5] and
- a new resolution by the Monetary and Credit Council to establish the E-Rial.[6]

While regulations pertaining to cryptocurrencies usually do not make a difference based on the geographical location of the user, Iran has opted for a pragmatic distinction between internal and external use of these digital assets.

While regulations pertaining to cryptocurrencies usually do not make a difference based on the geographical location of the user, Iran has opted for a pragmatic distinction between internal and external use of these digital assets.

A. A CONSERVATIVE INTERNAL APPROACH

The situation of cryptocurrencies as is relates to sharia is not obvious, and several Iranian Marjas[7] have declared cryptocurrencies forbidden[8] as they are associated with *Gharar* (uncertainty and unclear risks). However, in November 2021, the Supreme Leader of Iran issued a fatwa, declaring that "*mining, purchase, and sale of digital currency are subject to the laws and regulations of the Islamic Republic of Iran*"[9] such that there is no absolute ban from the perspective of sharia law. Hence, authorities are free to set a sharia-compliant regulation for cryptocurrencies. They did it rapidly but the framework is still evolving.

Around 4.5% of global bitcoin mining takes place in Iran[10] even not all the producers are officially registered. Indeed, production (hereafter, "**mining**") requires an establishment and operation permit from the Ministry of Industry, Mining and Trade. The equipment for crypto-mining must be qualified by the Iranian National Standards Organization. In July 2019, the Council of Ministers adopted a regulation titled "Conditions for using the cryptocurrencies and recognition of the mining industry".[11] Under this regulation, miners must pay the electricity export prices to be determined by the Ministry of Energy in accordance with the NIMA foreign exchange system.[12] Moreover, miners are recognized as "*industrial production units*" and must pay all the applicable taxes, like any business unit. However, pursuant to section 6, when "*miners export the process product and return the resulted currency to the internal economy in accordance with the regulations of the CBI*",[13] they benefit from a full income tax exemption.

On 21 November 2019, the Ministry of Industry, Mining, and Trade issued Guidelines for Obtaining Crypto Mining Licence and Issuing Crypto Mining Operation Permit. These guidelines are intended to help applicants, whether individuals or entities, know how they can obtain a licence for crypto-mining. Thus, when a licence for crypto-mining exists, the cryptocurrency will not be subject to the Anti-Smuggling Act of Merchandise and Currency.

The cryptocurrency exchange is allowed inside Iran under specific conditions.[14] In the draft regulations, the CBI sets certain general rules regarding exchange and Wallets. The main idea was to establish a broad liability regime for Iranian exchanges. Accordingly, the CBI bears no responsibility concerning the management, pricing, and validity or originality of global cryptocurrencies. Furthermore, all crypto exchanges are obligated to ensure the secure performance of their platforms and comply with anti-money laundering regulations and customer identification laws. Individual purchases and sales of cryptos in Iran must be carried out only after the full identity confirmation process. Exchanges must store all related information and provide the CBI with full information upon request. Moreover, the CBI reserved its right to establish a licensing regime for exchanges, but did mot implement it up to this point.

Many Iranians have seen here an opportunity to divest their money out of the national currency, which is deeply affected by inflation.

Many Iranians have seen here an opportunity to divest their money out of the national currency, which is deeply affected by inflation.

To date, more than 20 Iranian exchanges are operating without having obtained a licence, and are well-connected to Iran's banking system.[15] Iranians may thus make speculative transactions involving on cryptocurrencies if they abide by the regulation. Many Iranians have seen here an opportunity to divest their money out of the national currency, which is deeply affected by inflation. However, using cryptocurrencies as a payment method for domestic transactions remains prohibited pursuant to Article 2 of the Banking and Monetary Act of Iran.[16]

4. Council of Ministers' Resolution on "conditions for using the cryptocurrencies" and recognition of the mining industry 2019-07-28, http://media.dotic.ir/uploads/old/Attachs/1398/58144.pdf; *See* Amendment on 2020-10-04, https://dotic.ir/news/7734.

5. Draft requirements and regulations for cryptocurrencies adopted by the Central Bank of Iran (2019-02-07), https://way2pay.ir/wp-content/uploads/bkmrkzrmzpshnvs-way2pay-97-11-08.pdf.

6. Mehrnews, National cryptocurrencies were approved by the Monetary and Credit Council, 24 January 2022, https://bit.ly/3g3Nayc.

7. Highest-ranking authorities of Twelver Shia community, who execute shariah (Oxford Dictionary of Islam., Oxford Islamic Studies Online), www.oxfordislamicstudies.com/article/opr/t125/e1437. The term is usually applied to several jurists (grand ayatollahs).

8. Bultan News, Banning cryptos by some Marjas while CBDC is confirmed, 21 January 2022, https://bit.ly/3HaD9uR.

9. Donya-e-Eqtesad, "Fatwa by the Leader of Revolution about digital currency", 28 November 2021, https://bit.ly/3A5PDBu.

10. CNBC. "Iran bans bitcoin mining as its cities suffer blackouts and power shortages", 26 May 2021, https://cnb.cx/3g6q4XW.

11. Council of Ministers' Resolution on "conditions for using the cryptocurrencies" and recognition of the mining industry, 28 July 2019, http://media.dotic.ir/uploads/old/Attachs/1398/58144.pdf.

12. Iran has multiple exchange rates, namely official subsidized rate, the market rate, and a rate controlled by the CBI available to importers and exporters of essential goods named NIMA.

13. Note of section 6 of "Mining Procedures for Encrypted Processed Products".

14. Trading cryptocurrency is not regulated, but the vice-presidency for Legal Affairs confirmed that is not illegal, 1 August 2021, https://way2pay.ir/238289/; see also Draft requirements and regulations for cryptocurrencies adopted by the Central Bank of Iran (2019-02-07), Exchange Rules, https://way2pay.ir/wp-content/uploads/bkmrkzrmzpshnvs-way2pay-97-11-08.pdf.

15. Vokalapress, "A brief look at the approach of government in dealing with the phenomenon of cryptocurrency", 30 April 2021, https://bit.ly/3s3wo83.

16. "*The obligation to pay any debt can be fulfilled only by the official currency of the country unless otherwise agreed between the parties in accordance with the foreign exchange regulations of the country.*" Monetary and Banking Act of Iran, art. 2(d).

B. A BUSINESS-ORIENTED EXTERNAL APPROACH

A recent pro-business move in the Iranian Regulations has recently occurred: ***(i)*** cryptocurrency payments for foreign trade are soon to be allowed; ***(ii)*** the same for Letters of credit based on cryptocurrencies and blockchain for importation.[17]

Already in 2017, Swedish blockchain startup Brave New World Investments was formed to facilitate European investment in Iran via Bitcoin. The company received Bitcoins from investors and planned to convert them into Iranian rials to purchase shares of local companies on the Tehran Stock Exchange. The company never implemented the programme because CBI suddenly banned cryptos at that time. The policy has now changed.[18]

Similar efforts have also been done at a diplomatic level with eight countries,[19] mostly European, negotiating the use of cryptocurrency to circumvent US secondary sanctions pertaining to Iran, without a positive outcome.[20]

In January 2022, Iran's Trade Promotion Organization announced that the CBI – Ministry of Trade working group had approved the proposal to establish a mechanism for using cryptocurrencies in foreign trade.[21] The main idea is to provide alternative transaction methods for trade purposes so as to undermine the impact of sanctions. Accordingly, a system (platform) will be designed to issue and transfer the credit needed for importation based on blockchain technology. Ideally, this system will be connected to Iran's Comprehensive Trading System, also known as the Commodity Order Registration System, a website for integrating and monitoring foreign trade that links the merchants with authorities.

There are still many uncertainties regarding the implementation of this project; for instance, can it be used for export or is it limited for importation? Are there any differences as to the mining location of the used cryptocurrencies?[22] At this stage, the CBI and the Ministry of Industry, Mining, and Trade are drafting the relevant bylaws and regulations for the trade aspects of cryptocurrencies.[23]

When it comes to using cryptocurrencies for international trade, two main issues are at stake. The first one is volatility.

When it comes to using cryptocurrencies for international trade, two main issues are at stake. The first one is volatility. The market value of cryptocurrencies has been evolving steadily since its creation. However, it can undergo, in the short and medium term, several strong losses before a recovery. This lack of visibility makes it difficult for regular trade transactions. One Iranian seller who can afford to wait will very likely see the value of the cryptocurrency one holds come back and increase. Moreover, stable coins exist in Iran to contain volatility risk. For instance, Peyman is a gold-backed Iranian cryptocurrency but, so far, with a limitation as to the amount of gold. It remains to be seen if other stable coins will be accepted by Iran's Comprehensive Trading System.

The second point of attention is the compatibility of this method of payment with the foreign partner's own national regulations, potential bank overcompliance, and tax issues.

The second point of attention is the compatibility of this method of payment with the foreign partner's own national regulations, potential bank overcompliance, and tax issues. A quick glance at the main trade partner of Iran shows the potential of this solution. China has banned all independent cryptocurrencies, but the existence of the E-Yuan will provide, with the E-Rial, an even better financial channel. South Korea and Japan accept these payments if normal compliance processes are respected, as is already the case when companies of these countries trade in Toman or another sovereign fiat money. Of course, several countries, such as Iraq, have a strict or implicit ban on cryptocurrencies, but most have a CBDC project that will ease financial channels with Iran. It should be noted that despite the high regulatory risks, cryptocurrencies are compatible with traditional compensation patterns used in Iran, through exchanges offices to send and receive money outside the country; hence the example of a nearly-neighbouring country—used as a trade hub for Iranian companies—which sold financial licences to foreigners including for foreign exchanges and cryptocurrencies.

The business potential of cryptocurrencies could be unlocked soon, including through CBDCs.

2 Specially Designed Projects: Specific Tokens, National and Regional Cryptocurrencies

Independent cryptocurrencies may have huge potential for trading with Iran, but they also have strong limitations, including lack of visibility, while regulation is evolving fast worldwide. CBDC and other specific tokens could address most of the current challenges.

17. Tejarat News, "Is trade with crypto allowed? Two weeks until the official use of crypto currency!", 12 January 2022, https://bit.ly/32Kt4WM.

18. Mikael, "BNW Investments suspends Iran ambitions after cryptocurrency ban", Brave New World Investments (Sweden), 23 April 2018, http://www.bnw.investments/index.php/2018/04/23/bnw-investments-abandons-iran-ambitions-after-cryptocurrency-ban/.

19. Austria, Bosnia, UK, France, Germany, Russia, South Africa, and Switzerland.

20. Tehran Times, "Talks with 8 countries over using cryptocurrency in monetary transactions going on", 28 January 2018, www.tehrantimes.com/news/432400/Talks-with-8-countries-over-using-cryptocurrency-in-monetary

21. Eghtesadonline, "*The cryptocurrency will be in Iran's foreign trade in two weeks,*" 11 January 2022, https://bit.ly/35nS2vU.

22. The Cabinet resolution requires that only the legally minded cryptos inside Iran can be used for importation, however, it has been announced that this limitation will not be included in the new bylaw; Hamshahri, "Intervirew with the head of trade promotion organization", 11 January 2020, https://bit.ly/34kcNr0.

23. Eghtesadonline, "The entry of digital currency into Iran's foreign trade within next two weeks", 11 January 2022, https://bit.ly/3rNZ5Wc.

A. THE CASE FOR A CENTRAL BANK CRYPTOCURRENCY

> *"Creating national cryptocurrency is a proposed way to resolve the contradiction between decentralization, which is inherent in cryptocurrencies, and on the other hand, the monetary sovereignty of countries, the national cryptocurrency,"*[24]

declared the Deputy Head of CBI for New Technologies. CBDC projects, for obvious reasons, were at first pushed by countries under US sanctions like Cuba or Venezuela and now, Iran, since these projects bypass banks. Developing a CBDC is seen, for a larger audience, as a possibility to offer Central Banks a very tight control over money and its use.[25]

On 24 January 2022, the Monetary and Credit Council of Iran confirmed the E-Rial project[26], with the official name "Ramz Rial" (meaning encrypted Rial). Based on the CBI's 2019 draft rules, we know that like all CBDC projects:

(i) the CBI will be the exclusive publisher of the E-Rial;
(ii) E-Rial will not have mining capability;
(iii) E-Rial will be based on the Iranian official currency; and
(iv) E-Rial will be exchangeable only through the CBI and/or other authorized Banks.

E-Rial should also be legal for internal and external transactions. The CBI will be operating only as the issuer and will not engage in any direct interactions with the customers.[27] Commercial Iranian banks will create e-Wallets and provide direct services to customers, including Iranian companies. E-Rial should be an asset for foreign companies wishing to trade with Iran in several layouts. We find again the main advantages of using an independent cryptocurrency (cheap, direct, safe, and US-blind transactions) as a solution to the main issues companies face: bank's over-compliance and money repatriation.

CBI being under sanctions, switching E-Rials for E-Yuan and then for E-Euro should facilitate the repatriation of funds: which European State will dare to forbid E-Yuan conversion?

Being paid with an independent cryptocurrency still raises compliance issues in most European banks. However, a CBDC is the money of a sovereign State. CBI being under sanctions, switching E-Rials for E-Yuan and then for E-Euro should facilitate the repatriation of funds: Which European State will dare to forbid E-Yuan conversion?

B. THE HYPOTHETICAL CASE OF REGIONAL CRYPTOCURRENCY, ICO AND OTHER TOKENS

The CBI defines regional cryptocurrency as:

> *"a cryptocurrency that is issued and used on the basis of an asset agreed upon in a multilateral monetary agreement between several countries with the aim of facilitating and accelerating trade exchanges between those countries."*[28]

Moreover, the draft regulations apply the same general rules of CBDC to regional cryptocurrency. For instance, Iran's former President, Hassan Rouhani, specifically proposed a cryptocurrency-related payment system among Muslim countries to cut regional reliance on dollar.[29] Other scenarios such as establishing a regional cryptocurrency with Iran's partners (mainly China and Russia) or with the Shanghai Cooperation Organization members has been discussed[30]. So far, these projects are very theoretical due to lack of political will.

Initial Coin Offering (**ICO**) is a process in which a natural or legal person issues a new cryptocurrency or digital tokens and sells several units of the newly published token/crypto to investors for different purposes such as financing.[31] Token is defined by the CBI as "*a digital entity that represents a virtual or real value*"[32] and is assimilated to cryptocurrencies. Hence, we have Rial-backed Token, Gold/metal-backed Token, foreign currency-backed Token, and lastly, Tokens backed by other tangible and intangible assets. The last possibility could open the door to the easier financing of foreign investments in Iran. If usual compliance is respected, which could be facilitated by the blockchain traceability, direct financing would be facilitated in Iran.

Ultimately, several low-level signals should be monitored in the coming months to assess the real potential of Iran Cryptocurrencies regulation: **(i)** external incentives to use these tools with the possible revival of the JCPOA deal and its scope including, or not, more banking channels, **(ii)** progressive application of the Chinese CBDC to external trade before other major CBDC, **(iii)** evolution of Iran's situation before the Financial Action Task Force.

24. TCCIM, "RamzRial, the Iranian Cryptocurrency", 18 January 2022, http://www.tccim.ir/story/?nid=71801.
25. UK House of Lords, Economic Affairs Committee, "Central bank digital currencies: a solution in search of a problem?", para.105, 13 January 2022, https://committees.parliament.uk/publications/8443/documents/85604/default/.
26. Donya-e-eqtesad, "Describing the latest currency situation by the head of the Central Bank", 24 January 2022, https://bit.ly/3ABbfpr.
27. ISNA, Central Bank cryptocurrency pilot prepared, 12 January 2022, https://bit.ly/3IGTs2X.
28. *See* Draft requirements and regulations for cryptocurrencies adopted by the Central Bank of Iran, 7 February 2019, 11, https://bit.ly/3IL454N.
29. AP News, "Iran leader urges deeper Muslim links to fight US hegemony", (19 December 2019) https://bit.ly/3ra6L6c.
30. Tejaratnews, "Common cryptocurrencies of Iran, China and Russia?" (13 January 2022) https://bit.ly/3KMk8Bg.
31. *See* note 28.
32. *Ibid.*, 6.

لم تعد العملات المشفرة مقتصرة على مجتمع المهووسين أو حفنة من المستثمرين الماليين. إنها الآن جزء مهم من التمويل العالمي. لذا تقوم السلطات والهيئات التنظيمية المحلية والدولية بما في ذلك في الشرق الأوسط بتحديد موقفها من هذه العملات وتحدث لوائحها.

العملات المشفرة ليست شيئا جديدا بالنسبة لجمهورية إيران الإسلامية. ومع ذلك فقد دفع الوضع الاقتصادي الدولة إلى إجراء المزيد من التوضيحات في لوائحها واستخدام العملات المشفرة كأداة لتحقيق التنمية الاقتصادية على الرغم من العقوبات الأمريكية. يمكن أن يكون للعملات المشفرة في إيران، وكذلك الولايات القضائية الأخرى، تأثير على الفرص الاقتصادية وإن كان محدودا.

كما يمكن للعملات الرقمية للمصرف المركزي أن تغير قواعد اللعبة لأنها تعالج معظم التحديات التي تفرضها العملات المشفرة المستقلة. وفي هذا الصدد، فإن المشروع الإيراني الأخير للريال الإلكتروني لديه القدرة على تعزيز التجارة وفرص الاستثمار إذا قامت إيران بوضع إطار قانوني جريء.

BIOGRAPHY

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Transparency vs. Confidentiality: Inspection Rights in UAE Corporate Law

Inspection rights are a core component of corporate law. These rights give shareholders the opportunity to examine the company's books and records. In the UAE, Federal Decree-Law No. 32/2021 has included shareholder inspection right provisions. The law gives shareholders access to a wide variety of documents. Despite recent amendments to enhance these rights, there is still room for improvement. This article analyzes the main provisions governing inspection rights and provides some thoughts on moving forward.

Les droits d'inspection sont une composante essentielle du droit des sociétés. Ces droits donnent aux actionnaires la possibilité de consulter les livres et registres de la société. Aux Émirats arabes unis, le décret-loi fédéral n° 32/2021 a inclus des dispositions sur le droit d'inspection des actionnaires. La loi prévoit que les actionnaires ont accès à une grande variété de documents. Malgré les récentes modifications visant à renforcer ces droits, des améliorations sont encore possibles. Cet article analyse les principales dispositions régissant les droits d'inspection et propose quelques réflexions pour aller plus loin.

Dr. Bashar H. Malkawi
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Shareholder inspection rights permit a shareholder to access the necessary documents of the company in which he/she owns shares. These rights address the issue of information asymmetry and minimize agency costs[1] prevalent in many corporate structures. In the UAE, Federal Decree-Law No. 32/2021 has codified shareholder inspection rights.

The purpose of shareholder inspection rights is to allow a shareholder to obtain relevant documents so as to monitor company's financial performance.

The concept of shareholder inspection rights is not new in UAE corporate law. The right of inspect company's records is protected by court decisions.[2] However, the concept has been revised and improved in several revisions of the law, particularly in the Federal Law No. 2/2015 on Commercial Companies' version. The purpose of shareholder inspection rights is to allow a shareholder to obtain relevant documents so as to monitor company's financial performance.

There are several types of companies allowed under the Federal Decree-Law No. 32/2021 on Commercial Companies and each has its own inspection provisions. For example, Article 45.2 states that any partner in general partnership, even if not a manager, may request access to the business activities of the company and its books and records, and may give observations thereon to the manager of the company. In a limited partnership, Article 68 of the Federal Decree-Law No. 32/2021 gives the limited partner the right to obtain access to and copies or extracts of the books and records of the company at any time during the business hours of the company. In addition, a limited partner can obtain full and accurate information about the company's activities and a formal statement in respect thereof. These rights can be either exercised by the limited partner himself or herself or through other partners or third parties.

The UAE legislator has granted the right of inspection to shareholders in joint stock public corporations. Under Article 192 of Federal Decree-Law No. 32/2021, minutes of meetings of the General Assembly of shareholders shall be kept at the headquarters of the company. Any shareholder may review such minutes without consideration during ordinary working hours. The corporation may not refuse this right given by law to shareholders. If the company rejects or fails to comply with this right, the Securities & Commodities Authority may issue an order to scrutinize the contents of the minutes on the deliberations of the General Assembly. The Securities & Commodities Authority may also issue an order instructing the company to deliver the required copies to the person or persons who request such copies.

Article 223 of the Federal Decree-Law No. 32/2021 also gives the shareholder the right to access the books and records of the company and any documents pertaining to any of the company's deals made with a related party with permission from the board of directors or pursuant to a resolution of the General Assembly or as provided by the articles of association of the Company. Article 27 provides that every shareholder may, on written request, obtain a free copy of the last audited accounts and of the last report of its auditor and a copy of the accounts of the group if it is a holding company. The Company is required to respond to such request within ten days of the date of submission. As a matter of transparency, Article 140 requires a corporation to provide on its website a copy of its memorandum of association, articles of association, and any documents or other information as determined by the Securities & Commodities Authority. The corporation is required to send a copy of its memorandum of association and articles of association to any shareholder who so requests, at the latter's expense.

A quick reading to the Federal Decree-Law No. 32/2021 clearly provides for the right to inspect books and records of a company. Inspection rights may not be eliminated or limited by a provision in a corporation's articles of association. The law provides for wide varieties of documents that a shareholder can access to. These documents include accounting records, minutes of shareholders' meetings, memorandum of association, articles of association, and copies of resolutions. However, it is to be noted that the law that does not require the shareholder to provide a reason for requesting access to company's documents and records. An obvious example for inspecting company's records would be investigating corporate mismanagement.

There are no statutory restrictions on the eligibility of a shareholder or partner to exercise inspection rights, such as a requirement of a minimum shareholding level.

The relevant inspection provisions in Federal Decree-Law No. 32/2021 are detailed, leaving little room for courts to exercise review. There are no statutory restrictions on the eligibility of a shareholder or partner to exercise inspection rights, such as a requirement of a minimum shareholding level. The types of documents to which a partner or shareholder have access to are different. In limited and general partnerships, these documents are the company's books and records. In joint stock public corporations, these documents are:

- minutes of meetings;
- books and records of the company;
- any documents pertaining to any of the company's deals made with a related party;
- a copy of the last audited accounts and of the last report of its auditor and a copy of the accounts of the group if it is a holding company;
- memorandum of association; and
- articles of association.

Moreover, access to company's books and records in general and limited partnerships does not mandate prerequisites. By comparison, access to minutes of meetings, books, records, and other documents in joint stock public corporations requires certain procedures. The shareholder is required to make a request to obtain a copy of the corporation's memorandum of association and articles of association. Moreover, the shareholder shall must obtain the permission of the board of directors or pursuant to a resolution of the General Assembly to access to books and records of the corporation and must submit a written request to obtain a free copy of the last audited accounts and of the last report of its auditor. The differences between the procedure

1. George S. Geis, "Information Litigation in Corporate Law", 71 Alabama L. Rev. 407-451 (2019).
Available at: https://www.law.ua.edu/lawreview/files/2019/12/3-Geis-407-451.pdf.
2. *See, e.g.*, Case No. 71/1994 (17 July 1994), Dubai Court of Cassation.

for gaining access to certain documents by a partner in a general and limited partnership and the procedures for a shareholder in a joint stock public corporation could be due to the sensitivities and capital involved in the latter.

Federal Decree-Law No. 32/2021 does not cover the situation where a shareholder gains access to certain documents in exercising his or her inspection right and then discloses the information in a manner that harms the interests of the company. It seems that the law was concerned with granting this right to the shareholder or partner without considering the consequences. We will have to wait and see how UAE courts will interpret inspection rights. Inspection of books and documents can lead to information of mismanagement and thus court cases brought by shareholders. The class action by shareholders, as known in the United States, for example,[3] is non-existent in the UAE, where only derivative actions can be brought by shareholders. However, before filing a derivative lawsuit, the shareholder must demand that the company file a direct suit against the alleged wrongdoers. If this lawsuit is filed, the shareholder can bring a derivative lawsuit if the demand is rejected or not acted on. Finally, it remains to be seen how shareholder inspection rights under Federal Decree-Law No. 32/2021 would interact with disclosure requirements of joint stock public companies under the UAE securities law, as shareholders can rely on the latter with its strong disclosure requirements rather than inspection rights under the former.

3. Jessica Erickson, "The New Professional Plaintiffs in Shareholder Litigation", 65 Florida L. Rev 1-51 (2013). Available at: https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1148&context=flr.

تمثل حقوق التفتيش عنصرا أساسيا في قانون الشركات. تمنح هذه الحقوق المساهمين الفرصة لفحص دفاتر الشركة وسجلاتها. في الإمارات العربية المتحدة ، تضمن المرسوم الاتحادي بقانون رقم 32/2021 أحكام حقوق المساهمين في التفتيش. حيث يمكن القانون المساهمين من معاينة مجموعة متنوعة من الوثائق. وبالرغم من التعديلات الأخيرة لتعزيز هذه الحقوق، لا يزال هناك حاجة للمزيد من التحسين. تحلل هذه المقالة الأحكام الرئيسية التي تنظم حقوق التفتيش وتقترح بعض الأفكار للخطط المستقبلية.

BIOGRAPHY

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Dr. Malkawi has received several awards for his work. In addition to his scholarship, he frequently consults for a wide array of international organizations, governments, and international law firms on matters related to business law.

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Organised by LexisNexis® Middle East and sponsored by **Yungo Legal Consultants**, **NYU Abu Dhabi**, **Al Tamimi & Co.**, **HFW, DLA Piper** and **Phoenix Advisors Ltd.**, the first ever Women in Law Awards in the GCC was held on February 23rd at the Westin Dubai Mina Seyahi. Over 250 people came together to celebrate the inspiring women we have been able to meet and work in the legal field by showcasing their excellence and achievements.

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- Professional Achievement Award – **Linda Fitz-Alan** (Registrar & Chief Executive, ADGM Arbitration Centre)
- Woman of the Year – **Her Royal Highness Princess Hala Bint Khaled Bin Sultan Al-Saud**

The 2022 Women in Law award winners, from left to right: Rachel Armstrong (Dubai Future Foundation), Lidia Kamleh (Dubai Future Foundation), Janin Benahi (DLA Piper), Emily Law (Novartis), Francesca Gori (Accenture), Elizabeth Williamson (Accenture), Nasim Bazari (Novartis), Rana Hamooda (Baker McKenzie), Aqsa Khan Sadiq (Baker McKenzie), Kerri Watkins (Baker McKenzie), Laya Aoun-Hani (Baker McKenzie), Sally Kotb (Baker McKenzie), Sarah Malik (SOL International), Jasmin Fichte (Fichte & Co), Thenji Moyo (Gateley Legal), Niamh Boland (Gateley Legal), Linda Fitz-Alan (ADGM), Sarah Haddadi (Head of Rule of Law Business, LexisNexis Middle East).

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